Digitized by the Internet Archive
in 2025

https://archive.org/details/practicalelement0003char

MIDDLE TEMPLE LIBRARY
WITHDRAWN STOCK

KL 11 PET

A

PRACTICAL AND ELEMENTARY

Abridgment of the Common Law

AS ALTERED AND ESTABLISHED

BY THE

RECENT STATUTES, RULES OF COURT,

AND

MODERN DECISIONS;

COMPRISING A

FULL ABSTRACT OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Law, & on Appeal.

WITH

THE RULES OF COURT, FROM M. T. 1824, TO M. T. 1840, INCLUSIVE,

AND

THE STATUTES DURING THE SAME PERIOD.

WITH

CONNECTING AND ILLUSTRATIVE REFERENCES TO THE EARLIER AUTHORITIES AND EXPLANATORY NOTES.

BY CHARLES PETERSDORFF, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. III.

LONDON:
V. & R. STEVENS AND G. S. NORTON, 26 & 39, BELL YARD, LINCOLN'S INN,
Law Booksellers & Publishers,
(*Successors to the late* J. & W. T. CLARKE, *of Portugal Street*);
AND ANDREW MILLIKEN, GRAFTON STREET, DUBLIN.

1843.

RECD.
ENT
CAT.
ACK
COLL.
STP.
ACC. No.
018023

LONDON:
W. M'DOWALL, PRINTER, PEMBERTON-ROW,
GOUGH-SQUARE.

TABLE OF TITLES.

CONSTABLE. See *Distress — Escape — Game — Highway — Hue and Cry — Imprisonment — Innkeeper — Juries — Militia — Poor — Riot — Unlawful Assembly — Warrant.*

I. Relative to the Persons who may appoint, and the Instances in which they may exercise such Privilege.
- (*a*) As to High Constables, 2.
- (*b*) As to Petty Constables, 3.
- (*c*) As to Special Constables, 4.

II. Relative to the Persons who are eligible as Constables.
- (*a*) In general, 5.
- (*b*) As to particular Individuals, 5.
- (*c*) As to Persons residing within privileged Places, 6.
- (*d*) As to the Discharge of privileged Persons, 6.

III. Relative to the Election of, 6.
IV. Relative to the Swearing of, 6.
V. Relative to the Proceedings, and Punishment for refusing the Office, 7.
VI. Relative to the Duties of.
- (*a*) To shew his Warrant, but not to part with it, 8.
- (*b*) To act without a Warrant, 8.
- (*c*) To act with a Warrant, 10.
- (*d*) To act within his Precinct, 11.
- (*e*) To make a legal Arrest, 12.
- (*f*) To present Nuisances, 12.
- (*g*) To continue in Office until a new one is appointed, 13.

VII. Relative to the Rights of.
- (*a*) To appoint a Deputy, 13.
- (*b*) To be assisted, 13.
- (*c*) To take Bail, 13.
- (*d*) To the Expenses of his Office, 14.

VIII. Relative to the Privileges of, 15.
IX. Relative to the Liabilities of.
- (*a*) To Actions, 15.
- (*b*) To be indicted, 17.
- (*c*) To be removed, 17.

X. Relative to Pleadings connected with, 17.
XI. Relative to the Evidence connected with, 17.
XII. Relative to the Costs connected with, 18.

CONSTRUCTION. See *Contract — Covenant — Deed.*

CONSUL. (See 6 *Peters. Abr.* 151).

CONTEMPT.
I. Relative to Contempts against the Queen's Person and Government, 20.
II. Relative to Contempts against the Queen's Prerogative, 20.
III. Relative to Contempts against the Queen's Title, 21.
IV. Relative to Contempts against the Queen's Palace, 21.
V. Relative to Contempts against Courts of Justice.
- (*a*) As to Process.
  1. By destroying of, 21.
  2. Speaking contemptuously, 21.
  3. Not complying with Orders and Rules of Court, 21.
  4. For not obeying Writs of Habeas Corpus, 23.
  5. By instituting fictitious Suits, 23.
- (*b*) As to Individuals.
  1. Attornies. See *Attornies.*
  2. Gaolers. See *Prisoner.*
  3. Persons who prevent the Execution of Process. See *Process.*
  4. Persons who disobey Process. See *Process.*
  5. Sheriffs. See *Sheriff.*
  6. Witnesses. See *Witness.*

VI. Relative to the Arrest of Persons in, 23.
VII. Relative to Bail on, 24.
VIII. Relative to the Rights of Persons in, 24.
IX. Relative to the Discharge of Persons in, 24.
X. Relative to the Punishment, 24.

CONTINGENT DAMAGES. See *Damages.*

CONTINGENT ESTATE. See *Estate.*

CONTINGENT REMAINDER. See *Remainder.*

CONTINGENT USES. See *Uses.*

CONTINUANCES. See *Trial.*

CONTRACT. See *Fixtures — Frauds, Statute of — Guarantee — Insurance — Landlord and Tenant — Lease — Tender — Vendor and Purchaser — Warranty.*

CONTRACT—(*continued*).

I. Relative to the Creation of.
(*a*) As to being parol or written.
1. In general, 35.
2. When express, 35.
3. When implied, 35.
(*b*) As to being Specialties, or Contracts under Seal, 36.
(*c*) As to Records, 36.

II. Relative to the Form of Contracts.
(*a*) No particular Form necessary, 36.
(*b*) Should be clear and explicit, 36.

III. Relative to the Stamp.
(*a*) On Contracts in general.
1. As to Contracts within the Stamp Acts, 36.
2. As to Instruments not within the Stamp Acts, 37.
3. As to Instruments containing several separate and distinct Contracts, 37.
4. As to Instruments containing different Agreements with several Persons, 37.
5. As to the Time of stamping, 38.
6. As to compelling Parties to produce a Contract to be stamped, 38.
(*b*) On particular Contracts.
1. As to Annuities. See *Annuity.*
2. As to Appraisements. See *Appraisement.*
3. Connected with Apprentices. See *Apprentice.*
4. As to Attornies. See *Attorney.*
5. As to Arbitration Contracts. See *Arbitration.*
6. As to Bail Bonds. See *Bail.*
7. As to Bills of Lading. See *Lading, Bills of.*
8. As to Bills and Notes. See *Bills and Notes.*
9. As to Bonds. See *Bonds.*
10. As to Certificate. See *Attorney.*
11. As to Charter-Parties. See *Charter-Party.*
12. As to Cheques. See *Cheque.*
13. As to Composition Deeds. See *Composition Deed.*
14. As to Covenants. See *Covenant.*
15. As to Deeds. See *Deed.*
16. As to East India Company Contracts. See *East India Company.*
17. As to Feoffments. See *Feoffment.*
18. As to Frauds, Contracts connected with the Statute of. See *Frauds, Statute of.*
19. As to Grants. See *Grant.*
20. As to Guarantees. See *Guarantee.*
21. As to Indemnity Bonds. See *Indemnity.*
22. As to Insurance Policy Contracts. See *Insurance, Policy of.*
23. As to Leases. See *Lease.*
24. As to Marriage Contracts. See *Marriage.*
25. As to Mortgages. See *Mortgage.*
26. As to natural Love and Affection, Instrument relating to. See *Bond, Stamps.*
27. As to Offices, Contracts relating to the Sale of. See *Office.*
28. As to Partners and Partnership Contracts. See *Partners and Partnership.*
29. As to Receipts. See *Receipts.*
30. As to Ship and Shipping. See *Ship and Shipping.*
31. As to Warranties. See *Warranty.*

CONTRACT. Relative to the Stamp—(*continued*).

IV. Relative to the Parties who may contract.
(*a*) In general, 39.
(*b*) As to particular Individuals.
1. Agents. See *Principal and Agent.*
2. Aliens. See *Alien.*
3. Assignees. See *Bankrupt—Bond—Covenant—Debtor and Creditor—Deed—Insolvent Debtors — Lease — Remainder—Reversion—Way, Right of.*
4. Auctioneers. See *Auction and Auctioneer.*
5. Bankrupts. See *Bankrupt.*
6. Bastards. See *Bastard.*
7. Brokers. See *Principal and Agent.*
8. Churchwardens. See *Churchwardens.*
9. Clergymen. See *Ecclesiastical Persons.*
10. Commissioners. See *Bankrupt — Canal — Inclosure — Insolvent Debtors—Lunatic.*
11. Duress, Persons under. See *Duress.*
12. Executors and Administrators. See *Executor and Administrator.*
13. Feme Coverts. See *Husband and Wife.*
14. Gamblers. See *Gaming.*
15. Government Agents. See *Government Contracts.*
16. Husband and Wife. See *Husband and Wife.*
17. Idiots. See *Idiots.*
18. Infants. See *Infant.*
19. Lunatics. See *Lunatics.*
20. Married Women. See *Husband and Wife.*
21. Outlaws. See *Outlawry.*
22. Overseers. See *Overseers.*
23. Partners. See *Partners and Partnership.*
24. Servants. See *Master and Servant—Principal and Agent.*
25. Stock-Brokers. See *Principal and Agent—Stock-Jobbing.*
26. Trustees. See *Trustees.*

V. Relative to the Consideration.
(*a*) What a sufficient Consideration to support a Contract.
1. In general, 40.
2. By compounding, 44.
3. By abstaining from proving a legal Debt, or executing an Instrument in favour of a particular Creditor, 44.
4. To pay in default of Marriage, 44.
5. To pay on account of natural Love and Affection, 44.
(*b*) When illegal.
1. At common Law.
1.—In general, 44.
2.—On account of Cohabitation

CONTRACT. Relative to the Consideration —(*continued*).
and Prostitution. And see *Board and Lodging — Bond — Prostitution — Use and Occupation.*
3.—On account of Fraud. See *Fraud.*
4.—On account of being a Time Bargain. See *Gaming—Stock-Jobbing.*
5.—On account of Immorality. See *Prints.*
6.—On account of Promises made with Sheriff. See *Arrest—Bail—Sheriff.*
7.—On account of affecting the Course of Justice. See *Compounding.*
8.—On account of being in restraint of Marriage. See *Marriage.*
9.—On account of trading with an Enemy. See *Alien—Trade and Trading.*
2. By Statute.
1.—In general, 44.
2.—On account of Bankrupt paying Creditors for signing his Certificate. See *Bankrupt.*
3.—On account of Bribery. See *Bribery.*
4.—On account of forestalling, regrating, &c. See *Forestalling, Regrating.*
5.—On account of gaming. See *Gaming.*
6.—Relating to Liquors. See *Spirituous Liquors.*
7.—Relating to the Lord's Day. See *Frauds, Statute of—Sunday.*
8.—Relating to Lotteries. See *Lottery.*
9.—Relating to Offices, Sale of. See *Offices, Sale of.*
10.—Relating to Sheriffs. See *Sheriffs.*
11.—On account of Simony. See *Simony.*
12.—On account of Smuggling. See *Smuggling.*
13.—On account of Stock-Jobbing. See *Stock-Jobbing.*
14.—On account of Trading to the East Indies. See *East India Company.*
15.—On account of Treating at Elections. See *Election.*
16.—On account of Usury. See *Usury.*
17—On account of Wagers. See *Wager.*
(*c*) As to executed Considerations, 44.
VI. Relative to the Subject-matter of the Contract.
(*a*) As relates to Property.
1. Real Property. See *Covenant—Fixtures—Frauds, Statute of—Grant—Heir—Inclosures—Landlord and Tenant—Lease—Power—Release—Rent—Repairs — Replevin — Taxes — Use and Occupation.*

CONTRACT. Relative to the Subject-matter of the Contract—(*continued*).
(*b*) Personal Property. See *Accounting, Action for not—Account stated—Action—Apothecary — Apprentice — Attorney—Auction and Auctioneer—Bail—Bailment—Banker—Bank of England—Bankrupt—Barrister—Bastard—Bills and Notes—Bottomry and Respondentia Bond—Canal—Carrier—Cheque—Chose in Action—Churchwarden—Composition with Creditors—Contribution—Copyright — Corporation — Debtor and Creditor—Deceit—Demurrage—Deposit—Distress — Ecclesiastical Persons — Election—Escape—Exchange—Executor and Administrator—Fixtures — Forbearance—Frauds, Statute of—Freight—Gift—Goods bargained and sold—Goods sold and delivered—Guarantee—Herald—Husband and Wife—Indemnity — Infant — Innkeeper — Insolvent Debtor — Insurance — Interest — Joint-Stock Company — Judgments—Landlord and Tenant—Legacy — Lien — Maintenance — Marriage, Promise of—Master and Servant — Money had and received—Money lent and advanced—Money paid — Mortgage — Officer — Overseer—Pardon—Parent and Children — Partner — Party-wall — Physician — Poundage — Principal and Agent — Principal and Surety — Printer — Prize — Proctor — Property Tax — Prostitution—Receiver-General — Reward — Salvage — Scotch Bond — Sheriff—Ship and Shipping — Simony—Smuggling—Spirituous Liquors — Stamp — Stipulated Damages—Stocks—Surveyor—Sutters — Theatres — Tithes—Tolls — Trustees — Use and Occupation — Usury — Wager — Work and Labour — Witness — Warranty — Waste.*
(*c*) As relates to Services.
1. In general, 45.
2. By particular Individuals.
1.—Agents. See *Principal and Agent.*
2.—Apothecaries. See *Apothecary.*
3.—Apprentices. See *Apprentice—Master and Servant.*
4.—Arbitrators. See *Arbitration.*
5.—Attorneys. See *Attorney.*
6.—Auctioneers. See *Auction and Auctioneers.*
7.—Bail. See *Bail.*
8.—Broker. See *Principal and Agent.*
9.—Carrier. See *Carrier.*
10.—Counsel. See *Barristers.*
11.—Executors and Administrators. See *Executor and Administrator.*
12.—Factor. See *Principal and Agent.*
13.—Guarantees. See *Guarantee.*

CONTRACT. Relative to the Subject-matter of the Contract—(*continued*).

14.—Husband and Wife. See *Husband and Wife.*
15.—Infants. See *Infant.*
16.—Mechanics. See *Work and Labour.*
17.—Messengers and Commissioners of Bankrupt. See *Bankrupt.*
18.—Parish Officers. See *Churchwardens — Overseers—Parish Officers.*
19.—Partners. See *Partners and Partnership.*
20.—Physicians. See *Physicians.*
21.—Printers. See *Printers.*
22.—Proctors. See *Proctors.*
23.—Prostitutes. See *Board and Lodging—Prostitution.*
24.—Servants. See *Master and Servant—Principal and Agent.*
25.—Sheriffs. See *Sheriff.*
26.—Sureties. See *Bail—Bond—Covenant—Bills and Notes— Guarantees—Principal and Surety.*
27.—Surveyors. See *Surveyor.*
28.—Wharfinger. See *Carrier—Wharfinger.*
29.—Witnesses. See *Witness.*

VII. Relative to the Mutuality in the Contract, 45.

VIII. Relative to the Construction of the Contract.
(*a*) With reference to Contracts made in England, 46.
(*b*) With reference to Contracts made abroad, 53.

IX. Relative to Alterations in Contracts, and Effect of other Contracts controlling, 54.

X. Relative to the Adoption of the Contract, 55.

XI. Relative to the Transfer of Contracts, 55.

XII. Relative to the Apportionment of Contracts where Part is illegal, 55.

XIII. Relative to rescinding or extinguishing Contracts, 55.

XIV. Relative to the Performance of Contracts, 57.

XV. Relative to the Revival of Contracts, 59.

XVI. Relative to the Excuse for Non-Performance of the Contract.
(*a*) On account of the act of God, 59.
(*b*) On account of an act of Law, 59.
(*c*) On account of an act of Party, 60.
(*d*) On account of an act of a Stranger, 60.
(*e*) On account of legal Ignorance, 60.
(*f*) On account of Misrepresentation, 60.
(*g*) On account of being impossible, 61.
(*h*) On account of being made on a Sunday, 61.
(*i*) On account of Performance being illegal, 62.
(*j*) On account of Insanity, 62.
(*k*) On account of an Accident, 62.

CONTRACT—(*continued*).

XVII. Relative to the Form of Actions on Contracts.
(*a*) Special Assumpsit, 63.
(*b*) Indebitatus Assumpsit, 63.

XVIII. Relative to the Parties to the Actions on Contracts, 64. And see *Alien — Apprentice — Auction and Auctioneer—Bailment—Bankrupt—Bills of Exchange and Promissory Notes— Carrier— Charter-Party—Churchwarden— Copyhold— Copyright — Corporation — Demurrage —Executor and Administrator — Freight—Husband and Wife—Infant — Insolvent Debtor — Insurance — Landlord and Tenant— Lunatic— Mortgage —Overseer— Parent and Child—Partner and Partnership—Party-Wall—Principal and Agent—Principal and Surety — Salvage — Sheriff—Ship and Shipping—Taxes —Trustee—Use and Occupation.*

XIX. Relative to the Holding to Bail in Actions on, 64.

XX. Relative to the Declaration.
(*a*) Title of the Court, 65.
(*b*) Venue, 65.
(*c*) Day in, 65.
(*d*) General Requisites.
1. In Special Assumpsit. See *Bills of Exchange — Executor and Administrator — Forbearance — Freight—Landlord and Tenant— Marriage, Promise of —Money had and received—Poundage—Work and Labour.*
(*e*) Of the Inducement, 65.
(*f*) Of the Mode of stating the Contract, 65.
(*g*) Of the Mode of stating the Consideration, 67. And see *Bills and Notes — Executor and Administrator — Forbearance—Heir—Landlord and Tenant—Rent—Use and Occupation.*
(*h*) Mode of stating the Promise, 68.
(*i*) Mode of alleging Performance, 69. See *Bail—Bills and Notes—Forbearance— Guarantee — Landlord and Tenant — Lease — Marriage Principal and Surety—Stock.*
(*j*) Notice, 70.
(*k*) Request, 70.
(*l*) Breach, 71.
(*m*) Damages, 72.
(*n*) Amendment of, 73.
2. In an Indebitatus Assumpsit.
(*a*) How Consideration to be stated, 73.
(*b*) Must shew a Cause of Action, 73.
(*c*) Must allege a Request, 73.
(*d*) Must allege a Promise, 73.
(*e*) How a Promise is to be stated, 74.
(*f*) In particular Actions. See *Bankrupt —Copyhold—Exchange—Executor and Administrator — Goods bargained and sold—Goods sold and delivered — Insurance — Interest—Judgment — Money had and received—Money lent—Money paid—Rent —Surgeon —Tithes —Tolls—Use and Occupation — Wages — Work and Labour.*

CONTRACT—(*continued*).
XXI. Relative to the Pleas.
(*a*) In Denial.
1. General Issue, 74.
(*b*) In Confession.
1. As to Part, not shewing to what Part it applies, 75.
2. Payment of Money into Court, 75.
(*c*) In Avoidance.
1. By Common Law, 76. See *Alien Enemy — Baron and Feme — Duress—Frauds, Statute of—Infant—Intoxication—Lunatic —Non-joinder.*
2. By Statute, 78. See *Frauds, Statute of—Gaming—Usury.*
(*d*) In excuse of Performance. See *Set-off—Tender.*
(*e*) In Discharge.
1. By Common Law. See *Accord and Satisfaction — Account stated — Alien — Arbitration—Attainder — Composition with Creditors — Foreign Attachment — Judgment recovered—Outlawry.*
2. By Statute. See *Bankrupt — Insolvent Debtors — Limitations, Statute of — Request, Court of—Set-off.*
(*f*) By and against Executors and Administrators. See *Executor and Administrator.*
(*g*) Replications, Rejoinders, &c., 78.
XXII. Relative to the Evidence.
(*a*) In general, 78.
(*b*) In particular Instances. See *Account stated—Arbitration—Attorney—Bills and Notes—Goods bargained and sold—Goods sold and delivered —Insurance—Money had and received—Money lent—Money paid — Non Assumpsit — Stamp — Use and Occupation—Variance—Vendor and Purchaser—Warranty—Witness.*
XXIII. Relative to Inspection of the Contract, 82.
XXIV. Relative to staying Proceedings, 82.
XXV. Relative to a View in Actions on Contracts, 82.
XXVI. Relative to who to begin in Actions on Contracts, 82.
XXVII. Relative to the Damages, 83.
XXVIII. Relative to the Judgment and Costs, 84.

CONTRIBUTION, 85. (See *ante*, *Vol. II.*, 573). And *Bail — Bankrupt — Executor and Administrator—Guarantee—Insurance—Partners and Partnership —Party-wall—Principal and Surety —Salvage—Sheriff—Ship and Shipping—Trustees.*

CONUSANCE.
I. In what Cases Conusance may be claimed, 88.
II. By what Court it may be claimed, 88.
III. By what Persons it may be claimed, 88.
IV. Time and Manner of claiming Conusance, 88.
V. Plea of Conusance, 89.

CONVERSION. See *Trover.*

CONVEYANCE. See *Bankrupt — Bond — Contract—Composition with Creditors — Copyhold—Lease — Vendor and Purchaser—Voluntary Conveyance—Will.*

CONVEYANCER, 89.

CONVICT. See *Colony—Habeas Corpus.*

CONVICTION.
I. Relative to the Form of the Conviction.
(*a*) In general, 91.
(*b*) In particular. See *Beer—Carrier—Deer—Excise and Customs—Fishery — Game—Highway —Justices of the Peace — Mandamus — Master and Servant — Outlawry — Overseers — Plate — Smuggling —Stage Coach—Thames—Vagrant Act.*
II. Relative to Drawing up the Conviction, 95.
III. Relative to Defendant's Right to a Copy of the Conviction, 96.
IV. Relative to the Filing of the Conviction at the Sessions, 96.
V. Relative to the Construction of the Conviction, 96.
VI. Relative to the Consequences of a Conviction, 96.
VII. Relative to Appeals on Convictions, 97.
VIII. Relative to the Removal of Convictions by Certiorari, 98.
IX. Relative to the Powers and Duty of the Court convicting, 98.

CONVOY. See *Insurance—Ship and Shipping.*

CO-PARCENER. See *Parceners—Ejectment.*

COPY OF WRITTEN INSTRUMENTS.
I. Relative to Copies in general.
(*a*) As to sworn or examined Copies, 99.
(*b*) As to Office Copies, 99.
II. Relative to Copies in particular Cases. See *Bills and Notes — Constable — Contract — Conviction — Corporation — Courts — Declaration — Deed — East India Company — Evidence — Fines and Recoveries—Indictment — Judgment — Manor—Notice—Parish —Parliament—Particulars of Demand — Perjury —Process —Record — Statutes —Tithes — University — Warrants—Writs.*

COPYHOLD, ESTATE OF. See *Bail—Bankrupt — Land Tax—Mortgage—Remainder — Reversion—Settlement — Will.*
I. Of the Circumstances necessary to a Copyhold Estate, 112.
II. Relative to the Nature of Copyhold Estates, 113.
III. When Copyhold Estates do or do not become Freehold, 114.
IV. Relative to the Creation and Grant of Copyholds, 115.
V. Relative to the Transmission of Copyhold Estates.
(*a*) As to the Surrender.
1. As to its Necessity, 116.
2. What shall amount to a Surrender, 117.
3. What may be surrendered, 117.
4. As to who may surrender, 117.

COPYHOLD, ESTATE OF. Relative to the Transmission of Copyhold Estates —(*continued*).
5. As to the Parties to whom a Surrender may be made, 117.
6. As to the Place and Mode of making a Surrender, 118.
7. As to the Operation and Effect of a Surrender, 120.
8. As to the Construction of a Surrender, 121.
9. The Revocation of a Surrender, 122.
10. An erroneous Surrender, 122.
11. Mode of enforcing a Surrender, 122.
(*b*) As to the Admission.
1. As to its Nature, and when an Admission is necessary, 122.
2. As to the Proclamations previous to Admission, 123.
3. As to the Parties who may admit, 124.
4. As to the Parties who are entitled to be admitted, 124.
5. As to the Place where it is to be made, 126.
6. As to the Mode in which it is to be made, 126.
7. As to the Effect of the Admission, 126.
8. As to an erroneous Admission, 127.
VI. Relative to the Destruction of Copyhold Interests.
(*a*) By Forfeiture, 127.
(*b*) By Extinguishment, 130.
(*c*) Enfranchisement, 130.
VII. As to the relative Situations of Lord and Tenant.
(*a*) As to the Lord.
1. Connected with his Right of Property, 130.
2. To appoint a Steward, 131.
3. Of the Manor Courts and Courts Baron, 131.
(*b*) As to the Tenant.
1. As to his Duties.
1.—Connected with the Payment of Fines, 132.
2.—Connected with Heriots, 134.
2. As to his Privileges and Disabilities, 135.
VIII. Relative to the Remedies the Lord and Tenant have to protect their respective Rights.
(*a*) By Action.
1. By whom maintainable, 137.
2. As to the Court where they are to sue, 138.
3. As to the Form of Action, 138.
4. As to the Pleadings, 138.
5. As to the Evidence, 138.
6. As to the Witnesses, 140.
(*b*) By Distress, 140.
(*c*) By customary Plaints, 140.
(*d*) By Writ of Mandamus, 140.

COPYRIGHT, 141. See *Author*.

CORN RETURNS, 147. See 5 & 6 *Vict*.

CORNWALL, DUCHY OF, 148. See *Copyhold*.

CORONER. (6 *Peters. Abr.* 579). See *Deodand—Mandamus*.
I. Relative to the different Kinds of Coroners.
(*a*) Of the County, 150.
(*b*) Of the Verge, 151.
(*c*) Of the Admiralty, 151.
(*d*) In Boroughs, 151.
II. Relative to the Qualifications of, 151.
III. Relative to the Appointment, Election, Swearing, and Duration of the Coroner's Office.
(*a*) As to the Appointment of.
1. By virtue of Office, 151.
2. By Charter, 151.
3. By Election of, 151.
(*b*) As to the Swearing of, 152.
(*c*) As to the Duration of, in Office, 152.
IV. Relative to the Duty of the County, 152.
V. Relative to the Duty and Authority of Coroner.
(*a*) To act within his Jurisdiction, 152.
(*b*) To take Inquests.
1. In general, 152.
2. As to the definition of Offences over which he has power. See *Abortion—Assault and Battery—Bastard—Duelling—Homicide—Manslaughter—Murder—Riot—Treason--Unlawful Assembly*.
3. By whom to be taken where there are several Coroners, 152.
4. Within what Time to be taken, 153.
5. To summon the Jury, 153.
6. To view the Body, 153.
7. To summon and examine Witnesses, and receive Evidence; and of the Witnesses' Expenses, 153.
8. To adjourn the Inquest, 154.
9. As to the Form of the Inquisition, 154.
10. To take Recognizances, 156.
11. To issue Warrants for Apprehension and to commit to Prison, 156.
12. To execute Process, 156.
VI. Relative to the Rights of Coroner.
(*a*) To Fees, 156.
(*b*) To appoint a Deputy, 157.
VII. Relative to the Liabilities of the Coroner, 157.
VIII. Relative to the Verdict, 158.
IX. Relative to the Publication of Proceedings before the Coroner, and of a Stranger's Right to attend the Inquest, 158.
X. Relative to the Amendment and Quashing Inquisitions taken before a Coroner, and of the Removal of, 160.
XI. Relative to the Forfeiture occasioned by the Accused absconding, and of the Deodand, 160.
XII. Relative to the admissibility of Proceedings taken before a Coroner, and of the Coroner being a Witness, 160.
XIII. Relative to the Proceedings on the Death of a Coroner, 160.
XIV. Relative to the Effect of the Inquest, 160.

CORPORATION.
I. Relative to the Creation of.
(*a*) Before 5 & 6 Will. 4, c. 76.
1. By Implication, 168.

CORPORATION. Relative to the Creation of—(*continued*).
2. By Charter, 168.
3. By Letters Patent, 170.
4. By Statute, 170.
(*b*) Since 4 & 5 Will. 4, c. 76; 171.
II. Relative to the Compensation to Corporate Officers, under 5 & 6 Will. 4, c. 76; 171.
III. Relative to the Officers connected with.
(*a*) Before 5 & 6 Will. 4, c. 76.
1. As to Aldermen, 176.
2. As to Articled Clerks being Burgesses, 177.
3. As to Sheriffs, 177.
4. Of removing Officers, 178.
(*b*) Since the 5 & 6 Will. 4, c. 76.
1. As to the Crier, 178.
2. As to Sheriffs, 178.
(*c*) As to the Election.
1. Before 5 & 6 Will. 4, c. 76.
1.—Of the Candidate, 179.
2.—As to the Mode of Election, 180.
3.—As to invalid Elections, 184.
4.—Of the Admission, 185.
2. Since the 5 & 6 Will. 4, c. 76, 186.
IV. Relative to the Duties of.
(*a*) Before 5 & 6 Will. 4, c. 76; 188.
(*b*) Since 5 & 6 Will 4, c. 76; 188.
V. Relative to the Privileges of, since 5 & 6 will. 4, c. 76; 190.
VI. Relative to the Rights of, and Liabilities of.
(*a*) In general, before 5 & 6 Will. 4, c. 76; 190.
(*b*) To make Bye-Laws.
1. Before 5 & 6 Will. 4, c. 76; 192.
2. Since 5 & 6 Will. 4, 76; 196.
VII. Relative to Customs connected with, 197.
VIII. Relative to the Jurisdiction of Justices under 5 & 6 Will. 4; 197.
IX. Relative to the Courts within the 5 & 6 Will. 4, c. 76; 198.
X. Relative to the Borough Rate under the 5 & 6 Will. 4, c. 76; 199.
XI. Relative to the Remedies connected with.
(*a*) Before 5 & 6 Will. 4, c. 76.
1. Actions by, 203.
2. Actions against, 203.
3. Evidence and Witnesses, 203.
(*b*) Since the 5 & 6 Will. 4, c. 76.
1. Of the Form of Action, 204.
2. On what Contract maintainable, 206.
3. Changing the Venue, 206.
4. Pleas, 206.
5. Evidence and Inspection of Corpotion Books, 207.
6. Witnesses, 207.
7. Costs, 208.
XII. Relative to Corporations Foreign, and Scotch Burghs, 209.

COSTS.
I. Relative to the Definition and Nature of, 213.
II. Relative to Civil Proceedings.
(*a*) In general.
1. Plaintiff, when entitled to, 213.
2. Defendant, when entitled to, 216.

COSTS. Relative to Civil Proceedings—(*continued*).
3. Of the Judge's Certificate to deprive Plaintiff of Costs, 216.
4. When there shall be no more Costs than Damages, 219.
5. Of the Judge's Right to allow Costs at Chambers, 219.
6. Of Double and Treble Costs, 220.
7. When Plaintiff and Defendant pay their own Costs, 221.
8. Effect of succeeding on one of several Counts, 221.
9. Effect of succeeding on one of several Pleas, 222.
10. Effect of succeeding on all or one of several Issues, 222.
11. As to Costs in the Cause, 224.
12. As to Costs of the Day, 225.
13. As to the Admission and Proof of written Documents, 226.
14. As to Witnesses, 227.
15. As to Rules and Motions, and staying Proceedings, 229.
16. As to Re-pleader, 230.
17. Under particular Statutes, 231.
18. On Entry, Writ of, 231.
19. On View, Writ of, 231.
20. On a Venire de Novo, 232.
21. As to Models, &c. 232.
22. In the House of Lords, 232.
23. As to the Power of the Court to order third Parties to pay Costs, 232.
(*b*) In Particular.
1. As to particular Actions.
1.—*Real.* See *Darrein Presentment — Formedon—Right, Writ of.*
2.—*Mixed.* See *Dower—Ejectment — Quare Impedit — Waste.*
3.—*Personal.*
1. *Ex contractu.* See *Account — Assumpsit — Covenant — Debt—Detinue.*
2. *Ex delicto.* See *Case — Replevin — Trespass—Trover.*
2. As to particular Writs. See *Certiorari — Extent—Habeas Corpus — Inquiry — Mandamus — Process — Prohibition — Scire Facias.*
3. As to particular Causes of Action. See *Adultery — Annuity — Apprentice—Arbitration and Award —Assault and Battery — Bail Bond — Bastardy — Bills and Notes — Bond—Bribery—Common — Compounding — Contract — Copyhold — Deceit—Forcible Entry—Free Warren—Game — Highways—Imprisonment—Inclosures — Insurance — Libel — —Malicious Arrest—Mesne Profits — Mortgage — Party Wall — Penalty — Scandalum Magnatum —Slander—Tithes—Waste.*
4. As to particular Persons. See *Attorney — Bail— Bankrupt — Baron and Feme—Churchwardens—Clerk of the Peace—Constables — Excise and Custom*

COSTS. Relative to Civil Proceedings—(*continued*).

House Officers—Executors and Administrators — Infant — Informer, Common—Ingrossers—Jury—Justices of the Peace—Outlaws — Overseers—Paupers—Sheriff—Surveyors.

5. As to Miscellaneous Proceedings. See *Abatement — Admiralty—Amendment—Audita Querela—Demurrer — Discontinuance — Error—Feigned Issue—Foreign Attachment — Hundred —New Trials—Nolle Prosequi—Outlawry—Payment of Money into Court — Qui tam — Remanet—Repleader—Rules, Motions, and Orders — Sessions—Sham Plea—Staying Proceedings—Striking out Counts—Trial.*

(*c*) As to Security for.
1.—In general, 233.
2.—In particular.
1. As to the Form of Action, 234.
2. As to individuals.
1. Persons who reside abroad, or out of the Jurisdiction of the Court, 235.
2. Bankrupts, 237.
3. Executors and Administrators, 239.
4. Husband and Wife, 239.
5. Infants, 239.
6. Insolvents, 239.
7. Kings, Foreign, 240.
8. Lunatics, 240.
9. Peers, 240.
10. Prisoners, 240.
11. Seamen, 241.
12. Poverty, 241.
3.—Application for, how and when made.
1. How made, 241.
2. When to be made, 243.
4.—Effect of Order for, 244.
5.—As to further Security, and new Sureties, 244.
6.—As to exonerating Sureties, 245.

(*d*) As to the Taxation of.
1. Of the Notice to tax, 245.
2. Of the Power of the Taxing Officer, and the Course he is to pursue on Taxation, 247.
3. What are taxable Items, and of the Charges to be allowed, and by what Court ordered, 248.
4. As to whether the Taxation is to be according to the higher or lower Scale, 250.
5. As to the delivery of the Bill before Taxation, 251.
6. Of the Allocatur, 252.
7. Reviewing of, 252.

(*e*) As to the Set-off of, 254.

(*f*) As to the Remedies for.
1. By Execution, 257.
2. By Action, 257.
3. By Attachment.
1.—When it lies, 257.
2.—Against whom it lies, 258.
3.—General requisites to obtain, 259.
4.—Of the Demand, 259.
5.—Of the Rule, 260.
4. By Habeas Corpus, 262.

III. Relative to Criminal Proceedings, 263.

COTTON FACTORIES, 263.

COUNSEL'S SIGNATURE, 264. See *Barrister.*

COUNTERFEITING MONEY. See *Coin and Coinage.*

COUNTRY BANKERS. See *Bankers—Cheque.*

COUNTS, JOINDER OF. See *Declaration.*

COUNTY CLERK, 267.

COUNTY COURT, 279.

COUNTY GAOL, 267.

COUNTY RATE, 268.

COUNTY TREASURER, 275.

COURTS.

I. Relative to Courts in General, 276.
II. Relative to Inferior Courts, 276.
III. Relative to County Courts, 279.
IV. Relative to Courts of Equity, 282.
V. Relative to Courts Leet, 282.
VI. Relative to Courts Martial, 282.

COVENANT.

I. Definition and creation of Covenants.
(*a*) In general, 284.
(*b*) Particular Kinds of Covenants.
1. Conditional, 285.
2. Independent, 285.
3. Joint and several, 286.
4. Valid or illegal, 287.

II. Parties to Covenants.
(*a*) In general, 287.
(*a*) In particular.
1. Agents, 287.
2. Companies, public, 287.
3. Husband and Wife, 289.
4. Infants, 289.

III. Of the Construction of Covenants, and Provisoes.
(*a*) In general, 289.
(*b*) In particular.
1. Agricultural, 290.
2. Assign, not to, 291.
3. Fine, to levy, 291.
4. As to Fixtures, 291.
5. To indemnify, 292.
6. To insure, 292.
7. In Marriage Settlements, 292.
8. Land, running with, 292.
9. Life, during, 293.
10. Quiet Enjoyment, 293.
11. To pay Rates and Taxes, 295.
12. Re-entry, 296.
13. To renew, 297.
14. To pay Rent, 298.
15. To repair, 300.
16. Not to sue, 302.
17. Not to carry on certain trades, 302.
18. To yield up at the End of the Term, 305.

IV. As to Parol Evidence explaining, or Customs controlling, 306.

COVENANT—(*continued*).
v. As to the Performance of Covenants, and what shall be considered as a Breach and Waiver of; and of the Discharge from Covenants, 307.
vi. Remedies for Breach of Covenant.
(*a*) Actions, when and by whom maintainable, 309.
(*b*) Of the Declaration.
1. As to the Venue, 314.
2. As to the Form of the Declaration, and of Variances, 316.
3. Amendment of, 320.
(*c*) As to Oyer, 321.
(*d*) Particulars of Demand, 321.
(*e*) Of the Pleas.
1. In general, 321.
2. In particular.
1.—Fraud, 324.
2.—Limitations, Statute of, 324.
3.—Payment of Money into Court, 325.
4.—Adding Pleas, 326.
(*f*) Of the Replication, 326.
(*g*) Of the Evidence, 327.
(*h*) Who to begin, 328.
(*i*) Rule to compute, 328.
(*k*) Of the Damages, 329.
(*l*) Of the Costs, 330.

COVERTURE. See *Husband and Wife.*

CREDIT NOT EXPIRED. See *Contract.*

CRIMINAL CONVERSATION, 331.

CROSS ACTION, 332.

CROWN DEBT. See *Extent—Prerogative of the Crown.*

CROWN GRANTS. See *Prerogative of the Crown.*

CURATE. See *Ecclesiastical Persons.*

CURTESY. See *Copyhold—Husband and Wife.*

CUSTOM, 332. See *Common—Copyhold—Corporation--Covenant—Tithes—Landlord and Tenant.*

CUSTOM HOUSE. See *Excise and Customs.*

CUSTOMS AND EXCISE. See *Excise and Customs.*

CUTTING AND MAIMING. See *Indictment—Mayhem.*

DAMAGES. See *Declaration — Inquiry, Writ of.*
i. Relative to the Mode of stating Damages in Pleading. See post, *Declaration.*
ii. Relative to the Cases in which Damages are Recoverable.
(*a*) As to particular Forms of Action.
1. Real. See *Dower.*
2. Mixed. See *Ejectment—Quare Impedit—Waste.*
3. Personal.
1.—*Ex contractu.* See *Assumpsit—Covenant—Debt—Detinue.*
2.—*Ex delicto.* See *Case—Replevin—Trespass—Trover.*

DAMAGES. Relative to the Cases in which Damages are Recoverable—(*continued*).
(*b*) As to particular causes of Action. See *Adultery—Annuity—Apprentice—Arbitration—Assault and Battery—Bills and Notes—Bond—Bribery—Common — Contract — Copyhold—Deceit — Forcible Entry — Game—Highway—Imprisonment—Inclosure—Insurance—Libel—Malicious Arrest—Malicious Prosecution—Mesne Profits — Mortgage—Party Wall—Penalty — Poundage — Rescue — Slander—Tithes.*
(*c*) As to Miscellaneous Proceedings. See *Demurrer—Error—Feigned Issue—New Trial—Outlawry.*
iii. Relative to the Measure of Damages, 338.
iv. Relative to the Mode of Assessing Damages, 339.
v. Relative to Circumstances which go in Mitigation of Damages, 340.
vi. Relative to Increasing and Reducing Damages, 340.
vii. Relative to Nominal Damages, 341.
viii. Relative to Double and Treble Damages, 341.
ix. Relative to the Mode in which Damages are to be recovered. See *Execution—Judgment.*

DEBT. See according to the subject-matter.

DEBTOR AND CREDITOR.
i. Of the Parties between whom the relative Situation of Debtor and Creditor may be created.
1. Agents. See *Principal and Agent.*
2. Assignees. See *Bankrupt—Bond—Covenant—Deed—Insolvent Debtor—Lease—Remainder—Reversion.*
3. Auctioneers. See *Auction and Auctioneer.*
4. Bankrupt. See *Bankrupt.*
5. Bastard. See *Bastard.*
6. Brokers. See *Principal and Agent.*
7. Churchwardens. See *Churchwarden.*
8. Commissioners. See *Bankrupt—Inclosure—Insolvent Debtor—Lunatic.*
9. Drunkards. See *Intoxication.*
10. Duress, Persons under. See *Duress.*
11. Executors and Administrators. See *Executor and Administrator.*
12. Feme Covert. See *Husband and Wife.*
13. Gambler. See *Gaming.*
14. Husband and Wife. See *Husband and Wife.*
15. Idiots. See *Idiot.*
16. Lunatics. See *Lunatic.*
17. Outlaw. See *Outlawry.*
18. Overseer. See *Overseers.*
19. Partners. See *Partner and Partnership.*
20. Servants. See *Master and Servant.*
21. Smugglers. See *Bankrupt—Smuggling.*
22. Stock Brokers. See *Stock-jobbing.*
23. Trustees. See *Trustees.*
ii. Relative to the Mode of creating the relative Situation of Debtor and Creditor.
(*a*) In general, 344.

DEBTOR AND CREDITOR. Relative to the Mode of creating the relative situation of Debtor and Creditor—(*continued*).

(*b*) As relates to Property.

1. Real Property. See *Annuity—Common—Covenant—Fixtures—Frauds, Statute of—Landlord and Tenant—Lease—Mortgage—Power—Recognizance—Release—Rent—Repairs—Replevin—Taxes—Use and Occupation.*
2. Personal Property. See *Account stated—Accounting, Action for not—Action—Apothecary—Apprentice—Attorney—Auction and Auctioneer—Bailment—Bank of England—Banker—Bankrupt—Barrister—Bastard—Bills and Notes—Bottomry and Respondentia—Canal—Carrier—Cheque—Chose in Action—Composition—Contribution—Copyright—Corporation—Deceit—Distress—Election—Escape—Exchange—Executors and Administrators—Fisheries—Fixtures—Frauds, Statute of—Freight—Goods bargained and sold—Goods sold and delivered—Guarantee—Indemnity—Infant—Innkeeper—Insolvent Debtor—Insurance—Interest—Joint-Stock Company—Landlord and Tenant—Maintenance—Master and Servant—Money had and received—Money lent—Money paid—Mortgage—Parent and Child—Partner—Party Wall—Poundage—Principal and Agent—Principal and Surety—Printer—Proctor—Reward—Salvage—Scotch Bond—Sheriff—Ship and Shipping—Smuggling—Spirituous Liquors—Stamps—Stock—Surveyor—Theatres—Tithes—Tolls—Trustees—Use and Occupation—Usury—Wages—Warranty—Work and Labour—Witness.*

(*c*) As relates to services.

1. Agents. See *Principal and Agent.*
2. Apothecary. See *Apothecary.*
3. Apprentices. See *Apprentice—Master and Servant.*
4. Arbitrator. See *Arbitration.*
5. Attorney. See *Attorney.*
6. Auctioneer. See *Auction and Auctioneer.*
7. Bail. See *Bail.*
8. Brokers. See *Principal and Agent.*
9. Carrier. See *Carrier.*
10. Counsel. See *Barrister.*
11. Executor and Administrator. See *Executor and Administrator.*
12. Factor. See *Principal and Agent,*
13. Guarantee. See *Guarantee.*
14. Husband and Wife. See *Husband and Wife.*

DEBTOR AND CREDITOR. Relative to the Mode of creating the relative situation of Debtor and Creditor—(*continued*).

15. Infant. See *Infant.*
16. Messenger under Fiat in Bankruptcy. See *Bankrupt.*
17. Parish Officers. See *Churchwarden—Overseer.*
18. Partners. See *Partner and Partnership.*
19. Printers. See *Printers.*
20. Proctors. See *Proctor.*
21. Servants. See *Master and Servant—Principal and Agent.*
22. Sheriffs. See *Sheriffs.*
23. Sureties. See *Bail-Bond—Bills and Notes—Covenant—Guarantee—Principal and Surety.*
24. Surveyors. See *Surveyor.*
25. Wharfinger. See *Carrier—Wharfinger.*
26. Witness. See *Witness.*

III. Of the effect of the Creation of the relative Situations of Debtor and Creditor.

(*a*) In general, 345.

(*b*) As regards the remedies and rights of the Creditor. See *Account stated—Arrest—Assumpsit—Bankrupt—Bills and Notes—Contract—Costs—Covenant—Cross Action—Deed—Distress—Execution—Extent—Foreign Attachment—Guarantee—Indemnity—Interest—Judgment—Lien—Outlawry—Partners—Principal and Agent—Transitu, Stoppage in.—Voluntary Conveyance,*

(*c*) As regards the Discharge or Exoneration of the Debtor. See *Accord and Satisfaction—Bankrupt—Composition—Estoppel—Execution—Executors and Administrators—Insolvent Debtor—Judgment—Lien—Limitation, Statute of—Payment—Receipt—Release—Set-off.*

IV. Relative to the Construction of Contracts between Debtor and Creditor, and of void Conveyances, 345. See also *Composition with Creditors—Voluntary Conveyance.*

DECEIT. See *Warranty.*

I. Relative to the Action of, when maintainable.

(*a*) In General, 346.

(*b*) For false Representations, 347.

1. Before 9 Geo. 4; 347.
2. Since 9 Geo. 4; 347.

II. Relative to the Action of, by whom maintainable, 349.

III. Relative to the form of Action, 349.

IV. Relative to the Declaration, 350.

V. Relative to the Evidence, 350.

VI. Relative to the Witnesses, 351.

VII. Relative to the Damages, 351.

DECLARATION.

I. Of the Parties to.

(*a*) With reference to the form of Action and Subject-matter. See *Account, Action of—Action—Adultery—Arbitration—Assault and Battery—Assumpsit—Bills and Notes—Bond—Bribery—Charterparty—Common*

DECLARATION. Of the Parties to—(*continued*).
— Contract—Copyhold— Copyright — Covenant — Deceit — Detinue — Distress—Dower — Ejectment—Escape—Frauds, Statute of—Freight —Game—Gaming—Goods sold and delivered — Guarantee — Imprisonment—Insurance from Fire—Insurance on Lives—Insurance, Marine—Judgment—Landlord and Tenant—Libel—Malicious Arrest—Malicious Prosecution — Money had and received—Money lent—Money paid—Nuisance — Party Wall — Patent—Penal Statute—Replevin—Seduction — Ship and Shipping — Slander — Tithes—Trespass—Trover—Use and Occupation — Usury — Wager — Waste—Way.
(*b*) With reference to the particular Character or Capacity of the Party. See *Alien—Attorney—Auctioneer—Bail —Bankrupt—Carrier—Corporation —Executors and Administrators—Infant — Inn — Insolvent Debtor — Justice of the Peace — Lunatic — Master and Servant — Overseers — Parties to Actions—Partners—Principal and Agent — Principal and Surety — Sheriff — Trustee — Witness.*
II. Of the form of Action.
(*a*) Actions, ex Contractu. See *Assumpsit—Covenant—Detinue.*
(*b*) Actions, ex Delicto. See *Case, Action on — Ejectment — Replevin — Trespass—Trover.*
III. Of Declaring conditionally or absolutely, 354.
IV. Of Declaring by the bye, 355.
V. Of the time of Declaring, 355.
VI. Of the Declaration, not being now the Commencemet of the Suit, 356.
VII. Of Declaring against one Defendant on Process against several Defendants, 356.
VIII. Against Prisoner. See *Prisoner.*
IX. Compelling Plaintief to Declare, and Consequences of not Declaring in time, 358.
X. Form of Declaration.
(*a*) Title of the Court, 358.
(*b*) Of the Term or Day when filed or delivered, 358.
(*c*) As to the Venue, 359.
(*d*) As to the Description of the Method by which Defendant has been brought into Court, 359.
(*e*) Statement of the form of Action in accordance with the Writ, 360.
(*f*) Of the Description of the Character in which the Parties are designated in the Writ, 361.
(*g*) Of the word "Whereas," 361.
(*h*) Statement of Time, 361.
(*i*) Statement of the Promise and Breach, 361.
(*k*) Indorsement of Time to plead, 362.
(*l*) Statement of Cause of Action, and Manner of describing it in particular Actions, and for particular Causes of Action. See *Account stated—Adultery—Arbitration—Assault and Battery—Assumpsit—Attorney—Bail—Bankrupt—Bills and Notes—Bond—Bottomry and Respondentia Bond—Bribery—Carriers—Case, Action on — Charterparty — Churchwarden—Common — Contract — Copyhold — Copyright — Corporation — Covenant —Damages—Deceit—Detinue—Distress — Dower — Ejectment — Escape —Excise and Customs—Executor and Administrator — Extortion — Fish and Fishery—Frauds, Statute of—Game—Goods bargained and sold—Goods sold and delivered—Guarantee —Hundred—Husband and Wife—Imprisonment—Infant—Innkeeper—Insolvent Debtor—Insurance, Marine —Insurance on Life—Insurance from Fire—Interest—Judgment—Landlord and Tenant — Lease — Libel — Malicious Arrest—Malicious Prosecution—Master and Servant—Mesne Process—Money had and received—Money lent—Money paid—Nuisance —Partners—Party Wall—Patent—Penal Statutes — Post-horse Act — Principal and Agent—Principal and Surety—Quare Impedit—Qui Tam—Rent—Replevin—Right, Writ of—Sheriff—Ship and Shipping—Simony — Slander — Stock — Tolls — Trespass—Trover—Use and Occupation —Usury—Wager—Waste—Water—course—Way.*
XI. Joinder of Counts, 362.
XII. Striking out Counts, 364.
XIII. Of Delivering or Filing, 366.
XIV. Of the Notice of Declaration, 366.
XV. Of sticking up in the Office the Declaration or Notice thereof, 368.
XVI. Of setting aside the Declaration, 368.
XVII. In Inferior Courts, 370.
XVIII. Where the Cause has been removed, 370.

DE CONTUMACE CAPIENDO, 370. And see 3 & 4 *Vict. c.* 93.

DECREE IN EQUITY, 372.

DEED.
I. Relative to what Contracts must be by Deed, 376.
II. Relative to the Difference between Deeds and Parol Contracts, 376.
III. Relative to the Difference between Deeds Poll and Indentures, 376.
IV. Relative to the different Species of Deeds.
(*a*) As to real Property.
1. Connected with its Conveyance.
As to Conveyances at Common Law.
1. Original Conveyances.
1. Feoffments. See *Feoffment.*
2. Gifts. See *Gift.*
3. Leases. See *Lease.*
4. Partition. See *Partition.*
2. Derivative Conveyances.
1. Releases. See *Release.*
2. Confirmations. See *Lease.*
3. Surrender. See *Surrender.*
4. Assignments. See *Copyhold —Covenant—Lease—Mortgage.*

DEED. Relative to the different Species of Deeds—(*continued.*)
2. Connected with charging or encumbering it.
1. Bonds. See *Bond.*
2. Mortgages. See *Mortgage.*
3. Recognizances. See *Recognizance.*
(*b*) Connected with Personal Property.
1. Annuity. See *Annuity.*
2. Apprenticeship. See *Apprentice.*
3. Arbitration. See *Arbitration.*
4. Articles of Clerkship. See *Apprentice—Attorney.*
5. Deeds of Assignment of Personal Property. See *Advowson—Annuity—Apprentice—Attorney—Bills and Notes—Bond—Chose in Action—Copyright—Dower—Lading, Bill of—Rent—Tithes.*
6. Deeds of Charterparty. See *Charterparty.*
7. Deeds of Composition with Creditors. See *Composition with Creditors.*
8. Deeds of Insurance. See *Insurance.*
9. Deeds of Marriage Settlement. See *Marriage.*
10. Money Bonds. See *Bond.*
11. Deeds of Sale. See *Vendor and Purchaser.*
12. Deeds of Warranty. See *Warranty.*
(*c*) Connected with other Purposes.
1. Bail Bonds. See *Bail.*
2. Replevin Bond. See *Replevin.*
(*d*) Connected with particular Persons.
1. Corporations. See *Corporation.*
2. Debtor and Creditor. See *Composition with Creditors.*
3. Partners. See *Partner.*
4. Principal and Agent. See *Principal and Agent.*

v. General Requisites of Deeds.
(*a*) Parties to Contract, 376.
(*b*) As to the Consideration.
1.—In general, 376.
2.—In particular—Illegality of.
1. By Common Law.
1. Immoral. See *Bond.*
2. In respect of Trade. See *Trade.*
3. In respect of Marriage. See *Marriage.*
4. To compound a Criminal Prosecution. See *Compounding.*
5. To withhold Evidence. See *Evidence.*
6. Illegal Traffic. See *Smuggling.*
2. By Statute.
1. Bribery. See *Bribery.*
2. Gaming. See *Gaming.*
3. Gambling Insurances. See *Insurance.*
4. Price of Spirituous Liquors. See *Spirituous Liquors.*
5. Ransom of a Captured Ship. See *Ship and Shipping.*

DEEDS. General Requisites of Deeds—(*continued*).
6. Sale of Offices. See *Offices.*
7. Signing a Bankrupt's Certificate. See *Bankrupt.*
8. Simony. See *Simony.*
9. Stock-jobbing. See *Stock-jobbing.*
10. Usury. See *Usury.*
(*c*) As to its being in Writing or Printing, 377.
(*d*) As to its being on Paper or Parchment, 377.
(*e*) As to the particular Language and Character to be adopted, 377.
(*f*) As to its being Stamped. See *Apprentice—Arbitration—Attorney—Bail-Bond—Bond—Charterparty—Copyhold—Lease—Mortgage—Partition—Releases.*
(*g*) As to the Sealing, Signing, and Delivery of a Deed.
1. As to the Sealing, 377.
2. As to the Signing, 377.
3. As to the Delivery, 377.
(*h*) As to the Attestation, 378.
(*i*) As to the Re-execution of, 378.

vi. Relative to the Custody of a Deed, 379.

vii. Relative to the Construction of Deeds.
(*a*) In general, 373.
(*b*) As to particular Deeds. See *Annuity—Apprentice—Arbitration—Attorney—Bail—Bond—Charterparty—Composition with Creditors—Copyhold—Covenant—Gift—Guarantee—Indemnity—Insurance—Lease—Marriage—Mortgage—Partner—Principal and Agent—Recognizance—Release—Replevin—Vendor and Purchaser.*

viii. Relative to Contracts or Evidence varying or controlling Deeds, 381.

ix. Relative to Alterations in, 381.

x. Relative to lost Deeds, 381.

xi. Relative to the Remedies at Law to enforce Performance of Deeds.
(*a*) Holding to Bail, 382.
(*b*) As to the Pleadings.
1. Declaration, 382.
2. Profert, 382.
3. Oyer, 383.
4. Pleas.
1.—In general, 383.
2.—In denial.
1. Nil debet. See *Plea.*
2. Non est factum. See *Plea.*
3.—In Confession. See *Payment of Money into Court.*
4.—In Avoidance.
1. By Common Law. See *Duress—Infancy.*
2. By Statute. See *Bail—Gaming—Usury.*
5.—In Excuse.
1. By Common Law. See *Arbitration—Indemnity.*
2. By Statute. See *Bail.*

DEEDS. Relative to the Remedies at Law to enforce Performance of Deeds—(*continued*).
6.—In Discharge. See *Bankrupt — Bond — Insolvent—Release—Set-off —Tender.*
5. Replications, Rejoinders, &c., are arranged under the Pleas to which they are respectively applicable.
(*c*) As to the Evidence.
1. Proof of Execution.
1.—Must be proved by the attesting Witness, 384.
2.—Proof, when the attesting Witness is dead, blind, or cannot be found, 385.
3.—As to, when Proof of Execution need not be adduced, 385.
2. Inspection and Production of, 387.
3. Copy of Deed, 388.
(*d*) Witnesses, 388.
(*e*) Damages, Costs, and Judgment, 388.

DEER STEALING. See *Game.*

DEFAMATION. See *Libel — Prohibition — Slander.*

DEFAULT. See *Appearance—Judgment.*

DEFEASANCE—See *Cognovit—Contract—Warrant of Attorney.*

DE INJURIA, 389.

DEL CREDERE COMMISSION. See *Insurance—Principal and Agent.*

DEMAND. See *Arbitration—Bills and Notes—Cheque—Constable— Costs—Declaration — Ejectment — Game — Judgment — Lien— Oyer—Plea—Rent—Trover.*

DEMISE. See *Ejectment—Landlord and Tenant —Lease.*

DEMURRAGE. See *Charterparty—Insurance—Ship and Shipping.*

DEMURRER.
I. To Declarations, Pleas, Replications, &c. See *Account, Action of—Adultery —Advowson—Apprentice—Arbitration and Award—Assault and Battery — Assumpsit — Bail — Bills of Exchange and Promissory Notes—Bond — Bribery — Charterparty — Common — Contract — Copyhold — Copyright — Covenant—Deceit—Demurrage — Distress—Dower—Ejectment — Escape — Fences]— Fish and Fishing — Fixtures — Franchises — Freight — Game — Gaming — Guarantee — Hue and Cry — Imprisonment — Insurance — Interest — Judgment—Landlord and Tenant—Lease —Legacy— Libel—Malicious Arrest —Malicious Prosecution—Mortgage — Nuisance — Patent — Perjury — Post-horse Act—Post-Office—Prize and Prize Money—Replevin—Sale, Bill of—Salvage— Seduction— Ship and Shipping— Simony— Slander— Tithes — Tolls — Trespasses—Trover —Use and Occupation — Wager — Watercourse—Way.*

DEMURRER. To Declarations, Pleas, Replications, &c.—(*continued*).
II. In Scire Facias. See *Scire Facias.*
III. To indictment. See *Indictment.*
IV. As to the Time of Demurring, 394.
V. Form of.
(*a*) Statement of the Year, 395.
(*b*) Of the Commencement, 396.
(*c*) Must not be too large, 397.
(*d*) Of the Margin, 397.
VI. As to withdrawing a Demurrer, 398.
VII. Joinder in Demurrer, 399.
VIII. As to Signing, Delivering, and Filing, 400.
IX. As to Amendment after, 400.
X. As to the Effect of, 400.
XI. Setting aside Demurrer, 401.
XII. Of the Demurrer Book, 402.
XIII. Argument on, 404.
XIV. Judgment on, 405.
XV. Costs on, 406.
XVI. Writ of Inquiry on, 406.

DEPOSIT IN LIEU OF BAIL.
I. Relative to what kind of Bail the Statute applies, 407.
II. Of the Notice of the Deposit to remain in Lieu of Bail, 408.
III. Of the Deposit of the Costs, 409.
IV. Effect of, 409.
V. Under what Circumstances, and by whom, to be taken out of Court.
(*a*) By the Plaintiff, 410.
(*b*) By the Defendant, 411.
(*c*) By third Persons, 413.
(*d*) Rule for, 413.
(*e*) Motion for, when to be made, 413.
VI. Of striking the Sum paid into Court out of the Declaration, 414.
VII. Of the Power of the Court over the Sum paid in, 414.
VIII. Costs connected with, 415.

DEODAND. See *Coroner.*

DEPOSITIONS. See *Evidence.*

DESCENT, 415.

DETAINER. See *Prisoner.*

DETINUE, ACTION OF.
I. Relative to the general Nature of, 421.
II. Relative to, when maintainable, 421.
III. Relative to, by and against whom maintainable, 421.
IV. Relative to the Pleadings.
(*a*) Declaration, 422.
(*b*) Pleas, 423.
V. Relative to the Evidence, 424.
VI. Relative to staying Proceedings, 424.
VII. Relative to the Damages, 424.
VIII. Relative to the Verdict, Judgment, and Costs, 425.
IX. Relative to the Execution, 425.

DEVASTAVIT. See *Executor and Administrator.*

DEVIATION. See *Insurance.*

DEVISE, 425.

DILAPIDATIONS, 425. See *Landlord and Tenant.*

DIPLOMA, 427. See *Game—Physician.*

DISCLAIMER, 427. See *Landlord and Tenant.*

DISCONTINUANCE, 430.

DISFRANCHISEMENT. See *Corporation.*

DISORDERLY HOUSE. See *Bawdy House—Board and Lodging—Use and Occupation.*

DISSOLUTION. See *Corporation—Partners.*

DISTRESS.

I. Damage Feasant, 435.
II. For double Rent and Value, 436.
III. For Fines, 437.
IV. For Penalties to be recovered before Justices, 437.
V. For Port Dues, 437.
VI. For Rates, 437.
VII. For Rent.
(*a*) With reference to the several kinds of Rents, 437.
(*b*) With reference to the Persons who may distrain.
1. In general, 439.
2. Assignees, 443.
3. Executors, 443.
4. Joint Tenants and Tenants in common, 444.
5. Receiver, 444.
6. Liability of Party authorizing the Distress, 445.
(*c*) With reference to the Persons whose Goods may be distrained, 445.
(*d*) With reference to the Things which may be distrained, 446.
(*e*) With reference to Things in the Possession of third Persons, 446. See *Innkeepers—Principal and Agent—Stablekeepers—Wharfingers.*
(*f*) With reference to Things in the Custody of the Law, 448.
(*g*) With reference to the Place in which a Distress may be made, 448.
(*h*) With reference to the Period limited for making a Distress, 448.
(*i*) With reference to the Mode of conducting a Distress.
1. What amounts to a Distress, 449.
2. Of the Demand of, and Tender of the Rent, 451.
3. By whom, 451.
4. At what Time to be made, 452.
5. Of breaking open Doors, &c., 452.
6. Of the Inventory, 453.
7. Of the Notice, 453.
8. Of the Appraisement, 453.
9. Of the Sale, 454.
10. Of the Surplus, 454.
11. Of the Charges to be paid to the Distrainer, 454.
(*j*) With reference to, when the Goods are already in Execution, 455.
(*k*) With reference to making several Distresses for the same Rent, 455.
(*l*) With reference to making a joint Distress for several Rents, 455.
(*m*) With reference to a fraudulent Removal, 456.
VIII. Excessive, 458.
IX. Of the Effect of, 459.
X. Of the Waiver of, 459.
XI. Of a Re-taking, 459.
XII. Where no sufficient Distress, 460.
XIII. Of the Replevy, 460.
XIV. Of Agreements to withdraw, 461.
XV. Actions connected with.
(*a*) When maintainable, and Form of, 461.
(*b*) By whom maintainable, 462.
(*c*) Of the Declaration, 462.
(*d*) Of the Pleas, 463.
(*e*) Of the Replication and new Assignment, 465.
(*f*) Of the Evidence, 465.
(*g*) Of the Witnesses, 466.
(*h*) Of the Damages, 467.
(*i*) Of the Costs, 467.

DISTRINGAS. See *Outlawry.*
I. Relative to, when grantable.
(*a*) Before Uniformity of Process Act, 469.
(*b*) Since Uniformity of Process Act.
1. Where Defendant accepts the original Writ, 471.
2. Where Defendant is in England, and Residence known, 472.
3. Where Defendant is in England, and Residence unknown, 474.
4. Where Defendant is abroad, 475.
II. Relative to, against whom it lies, 476.
III. Relative to the Affidavit, 476.
IV. Relative to when to be moved for, 478.
V. Relative to the Form of, 478.
VI. Relative to the Indorsement on, 479.
VII. Relative to the Levy, 479.
VIII. Relative to the Appearance, 479.
IX. Relative to Rules connected with, 481.
X. Relative to setting aside, 481.
XI. Relative to Judgment after, 482.

DISTRIBUTION, STATUTE OF. See 8 *Peters. Ab.* 447—*Mascall on the Statute of Distributions.*

DISTURBANCE. See *Common—Decoy—Riot—Way.*

DIVORCE. See *Husband and Wife*—8 *Peters. Ab.* 459.

DOCKET-ROLL. See *Roll.*

DOCKETING-ISSUES. See *Issue.*

DOGS. See *Animals—Game.*

DONATIO CAUSA MORTIS, 483.

DONATIVE. See *Advowsons.*

DOUBLE INSURANCE. See *Insurance.*

DOUBLE PLEAS. See *Pleas.*

DOUBLE RENT AND VALUE, 484.

DOWER, 486.

DRAINAGE, 490. See 3 & 4 *Vict. c.* 55.

DRAMATIC PERFORMANCE. See *Theatre.*

DRIVING.
I. Action for negligent Driving, when maintainable, 491.
II. By and against whom maintainable, 492.
III. Of the form of Action, 494.
IV. Of the Pleas, 495.
V. Of the Evidence, 496.
VI. Of the Witnesses, 497.
VII. Of the Damages, 497.

DUPLICITY. See *Pleas—Replications.*

DURESS. See *Bills and Notes.*

DYING DECLARATION, 498.

EASEMENT, 499.

EAST INDIES, 500.

EAST INDIA DOCK, 500.

ECCLESIASTICAL COURT, 500.

ECCLESIASTICAL PERSONS, 501. See also *Advowson—Simony.*

EJECTMENT.

I. Relative to the Definition and Nature of, and how Commenced, 509.
II. Relative to whether Ejectment or Trespass, 509.
III. Relative to the Requisites generally essential to support the Action.
(*a*) As to the Title.
1. In general, 509.
2. By Statute of Limitations, 511.
(*b*) As to the Entry, 514.
(*c*) As to the notice to quit, 514.
(*d*) As to demanding Possession, 514.
IV. Relative to the Persons by whom it may be maintained, 515.
V. Relative to the Persons against whom it may be maintained, 516.
VI. Relative to the Things for which it may be maintained, 517.
VII. Relative to the Ouster, 518.
VIII. Relative to the Declaration.
(*a*) In General.
1. Whether by Bill or Original, 518.
2. How intitled, 518.
3. Venue, 519.
4. Formal Commencement of, 520.
5. Parties, 520.
6. Day, 520.
7. To be written on one Side of the Paper only, 521.
(*b*) Formal Parts.
1. Description of the Premises or Subject-Matter of the Action, 521.
2. Description of the Situation, 521.
3. Statement of the Demise, 522.
4. Statement of the Entry, 523.
5. Statement of the Ouster, 523.
(*c*) Of the Notice to appear, 523.
(*d*) As to the Service.
1. Of Rule, H. T. 4 Will. 4; 525.
2. At what Time, 525.
3. On whom.
1st.—In general.
1. Of the general Rule, 526.
2. Upon the Tenant himself, 526.
3. Upon the Wife, 526.
4. Upon the Mother or Sister, 528.
5. Upon the Son, 528.
6. Upon the Daughter, 528.
7. Upon the Nephew or Niece, 529.
8. Upon the Servant, 529.
9. Upon Occupiers as contradistinguished from Tenants, 531.
2nd.—In particular.
1. Where there are several Tenants, 531.
2. Upon One who personates or represents the Tenant, 531.
3. Where Tenant resists the Service, or refuses to be seen, 531.
4. Upon Administratrix and Executor, 532.
5. In case of Bankruptcy, 532.
6. In Ejectment for a Chapel, 533.
7. Connected with Companies, 533.
8. As to Foreigners, 533.
9. As to Joint-Tenants, 533.
10. As to Mortgagees, 534.
11. As to Overseers, 534.
12. As to Prisoners, 534.
4. Where the Possession is vacant, 534.
5. Off the Premises, 534.
6. As to being good for Part and bad as to Residue, 534.
7. As to the Explanation and Acknowledgment thereof, 535.
8. Affidavit of, 535.
(*e*) As to the Amendment of, 537.
IX. Relative to Ejectments under the 1 Geo. 4, c. 87.
(*a*) To what Cases it extends, 537.
(*b*) Declaration and Notice to appear, 539.
(*c*) Of the Affidavit, 539.
(*d*) Of the Recognizance, 540.
(*e*) Of the Consent Rule and Judgment, 541.
(*f*) Of the Execution, 542.
(*g*) Of the Costs, 542.
X. Relative to Ejectments under 11 Geo. 4 & 1 Will. 4, c. 70; 542.
XI. Relative to Ejectments on a vacant Possession, and no Distress, 544.
XII. Relative to the ancient Mode of Proceeding, and when it must be observed, 545.
XIII. Relative to the Appearance and Judgment against the Casual Ejector for Non-appearance.
(*a*) When the Parties appear, 546.
(*b*) When the Parties do not appear, and of the Judgment against Casual Ejector, 546.
XIV. Relative to the Landlord's Appearance, and the Tenant's not giving the Landlord Notice of Ejectment, 550.
XV. Relative to the Consent Rule, 552.
XVI. Relative to Bail, 553.
XVII. Relative to the Effect of bringing, 553.
XVIII. Relative to consolidating Actions, 553.
XIX. Relative to the Pleas.
(*a*) General Issue, 554.
(*b*) Of special Pleas, 554.
(*c*) Signing Judgment for want of, 554.
XX. Relative to the Replication, 554.
XXI. Relative to the Issue, 554.
XXII. Relative to the Evidence.
(*a*) Of Defendant's Possession, 555.
(*b*) Of the Title, 555.
(*c*) Of the Entry, 556.
(*d*) Of the Premises, 556.
(*e*) Of the Ouster, 557.

EJECTMENT. Relative to the Evidence—(*continued*).
(*f*) Of written Documents and Statements by deceased Witnesses, 557.
(*g*) Who to begin, 558.
XXIII. Relative to the Witnesses, 558.
XXIV. Relative to the Trial, 560.
XXV. Relative to the Verdict, 560.
XXVI. Relative to the Judgment, 560.
XXVII. Relative to the Damages, 561.
XXVIII. Relative to the Costs.
(*a*) Security for, 561.
(*b*) Plaintiff or Defendant, when entitled to.
1. In general, 562.
2. Under 1 Geo. 4, c. 87; 563.
(*c*) Liability of Strangers for, and Right to, 563.
(*d*) Remedy for, 563.
XXIX. Relative to the Execution.
(*a*) In general, 564.
(*b*) Under 1 Will. 4, c. 70; 565.
XXX. Relative to the Venire de Novo, 565.
XXXI. Relative to the new Trial and second Action for the same Premises, 566.
XXXII. Relative to the Writ of Error, 566.
XXXIII. Relative to the setting aside and staying Proceedings, 567.
XXXIV. Relative to removal of the Action, 570.

ELECTION.
I. Of Persons.
(*a*) In General. See *Bankrupt—Churchwardens—Constable—Corporation—Office and Officer—Overseer—Sheriff.*
(*b*) To serve in Parliament.
1. As to Electors.
1st. Qualification of, 573.
2nd. Who entitled to vote, 574.
2. As to bribery and treating at Elections, 574.
3. As to contested and Controverted Elections, 577.
4. Actions connected with.
1st. Declaration, 582.
2nd. Pleas, 583.
3rd. Evidence, 583.
5. Indictments connected with, 583.
II. Connected with Property. See *Copyhold Estates—Executor and Administrator—Heir—Husband and Wife—Infant—Legacy — Marriage — Rent—Tenant for Life—Tenant in Tail.*

ELEGIT. See *Execution.*

EMBEZZLEMENT.
I. Relative to what amounts to, and by whom committed.
(*a*) By private Individuals, 584.
(*b*) By Officers in her Majesty's Service, 586.
II. Relative to the Indictment, 586.
III. Relative to the Evidence, 587.
IV. Relative to the Punishment, 587.

EMBLEMENTS, 588.

ENCROACHMENTS, 589.

EQUITY, 589.

ERASURE, 589.

ERROR, WRIT OF. See *Cognovit.*
I. In civil Proceedings.
(*a*) Relative to the Proceedings on which a Writ of Error will lie, 591.
(*b*) Relative to the Grounds of Error, 592.
(*c*) Relative to Frivolous Writs of Error, 593.
(*d*) Relative to the Court from and to which it lies, 593.
(*e*) Relative to the Parties to the Writ, 594.
(*f*) Relative to the Form of the Writ, 595.
(*g*) Relative to the suing out, 596.
(*h*) Relative to the Effect of, and Allowance of, 596.
(*i*) Relative to Bail in, 598.
(*j*) Relative to certifying or transcribing the Record, 600.
(*k*) Relative to alleging Diminution of, and of the Assignment of Error, 601.
(*l*) Relative to the Sci. fa. quare executionem non, 602.
(*m*) Relative to the Pleadings and Joinder in Error, 602.
(*n*) Relative to Affidavits connected with, 603.
(*o*) Relative to Amendments connected with, 603.
(*p*) Relative to the Error Books, 605.
(*q*) Relative to the Argument on, 605.
(*r*) Relative to the Sum recoverable, 606.
(*s*) Relative to the Judgment, 607.
(*t*) Relative to the Costs, 608.
(*u*) Relative to the Execution, 610.
(*v*) Relative to the Restitution, 611.
(*w*) Relative to setting aside and quashing, 611.
(*x*) Relative to a Repleader, 612.
II. In Criminal Proceedings, 612.

ESCAPE.
I. Relative to Civil Cases.
(*a*) What amounts to.
1. In general, 613.
2. In particular.
1.—On Mesne process, 613.
2.—On final Process, 614.
(*b*) Rule calling on the Marshal to produce, 614.
(*c*) Remedy for.
1. By Action.
1.—By and against whom maintainable, 614.
2.—Declaration.
1. Title of, 615.
2. Venue, 615.
3. On Mesne Process, 615.
4. On final Process, 615.
3.—Particulars of Demand, 617.
4.—Pleas, 617.
5.—Evidence, 618.
6.—Damages, 620.
7.—Judgment, 620.
8.—Costs, 620.
2. By Attachment, 621.
3. By Information, 621.
II. Relative to Criminal Cases, 621.

ESCHEAT, 621.

ESCROW. See *Bond—Covenant—Deed.*

ESSOIGN. See *Declaration—Ejectment.*

ESTOPPEL, 622. See *Ejectment—Landlord and Tenant.*

ESTOVERS. See *Common.*

ESTREATS. See *Recognizance.*

EVICTIONS. See *Covenant—Landlord and Tenant—Quiet Enjoyment.*

EVIDENCE.

I. Relative to Evidence in general.
- (*a*) Of the Party bound to prove the necessary Facts, 627.
- (*b*) Secondary Evidence, where admissible, and its effect.
  1. In what Cases admissible, and of the difference between secondary and defective Evidence, 627.
  2. Preliminary Proceedings to authorize the Admission of secondary Evidence.
     1.—Proof of, that the highest Evidence cannot be obtained, 629.
     2.—Of the Notice to produce, 629.
- (*c*) Presumptive Evidence, when admissible, and its Effect, 631.
- (*d*) Hearsay and Reputation, Evidence of, when admissible, and its Effect, 632.
- (*e*) Parol Evidence, 632.
- (*f*) Admissions.
  1. General Rule, 633.
  2. Of Rule, H. T. 4 Will. 4; 635.
  3. By Deed or Record, 636.
  4. In Pleadings, 636.
  5. In Notice to produce, 636.
  6. Where not confirmed at the Trial, 636.
  7. In Criminal Cases, 637.
  8. By Particular Persons.
     1.—By Agent, 637.
     2.—By Assignees, 637.
     3.—By Cestui que Trust, 637.
     4.—By joint Wrong-doer, 637.
     5.—By Party to the Record, 637.
     6.—By Party not to the Record, 637.
     7.—By Stewards, 638.
     8.—By a deceased Party, 638.
- (*g*) Before Justices of the Peace, 638.
- (*h*) Relative to Instruments and Proceedings, partly public and partly private.
  1. Ancient Documents, 639.
  2. Answers in Chancery, &c., 639.
  3. Bishop's Register, 640.
  4. Exemplifications, 640.
  5. Fleet Register, 641.
  6. Interrogatories, 641.
  7. Lords, House of, Journals in, 641.
  8. Proceedings in a former Cause, 641.
  9. Records, 641.
  10. Remembrancer's Office, Documents from, 641.
  11. Rules of Court, 641.
  12. Sheriff's Office, Documents from, 642.
  13. Tablets in Churches, &c., 642.
  14. Topographical History, 642.
  15. Writs, 642.
- (*i*) Relative to private Documents, Letters, &c., 642.
- (*j*) Relative to Depositions, 643.
- (*k*) Relative to impounding, 644.
- (*l*) Relative to New Trials, 644.
- (*m*) Relative to the course of Proof, 644.

EVIDENCE. Relative to Evidence in general—(*continued*).
- (*n*) Where a written Document is disclosed on Examination, 644.
- (*o*) Relative to Identity, 645.
- (*p*) Relative to the Death of a Party, 645.
- (*q*) Relative to foreign Proceedings, 645.
- (*r*) Relative to the Mode of objecting to Evidence. See *Demurrer to Evidence—Exceptions, Bill of—New Trial—Nonsuit.*

II. Relative to Evidence in Particular Actions and connected with particular Subjects. See according to the subject-matter.

III. Relative to Evidence in Criminal Proceedings. See *Indictment*, and particular heads according to the subject-matter.

EXCEPTIONS, BILL OF, 646.

EXCHANGE, 647.

EXCHEQUER, CLERKS OF COURT OF, 647.

EXCISE AND CUSTOMS, 648. See 3 & 4 *Will.* 4, *c.* 58.

EXECUTION.

I. In Civil Proceedings.
- (*a*) In general.
  1. With reference to the Persons by and against whom Execution may issue.
     1.—In general, 651.
     2.—In particular. See *Corporation — Executors and Administrators — Heir — Hundredors — Husband and Wife—Insolvent Debtors — Partners — Prisoners.*
     3.—Relative to a Change of Parties; as, by *Bankruptcy*, see *Bankrupt—Death*, see *Executors and Administrators — Marriage*, see *Husband and Wife.*
  2. With reference to the Cases in which Execution may issue, 651.
  3. With reference to the Court by whom awarded, 652.
  4. With reference to the Party being estopped from suing out, 653.
  5. With reference to the Period limited for suing out, 653.
  6. With reference to the Form of, and Mode of conducting, 654.
  7. With reference to speedy Execution under 1 Will. 4, c. 7; 655.
  8. With reference to concurrent Writs, 657.
  9. With reference to successive Writs, 658.
  10. With reference to setting aside, 659.
- (*b*) In particular.
  1. Of the Capias ad Satisfaciendum, 659.
  2. Of the Habeas ad Ca. Sa., 660.
  3. Of the Fi. Fa.
     1.—In what Cases a Fi. Fa. may issue, 661.
     2.—As to the Things which may be taken in Execution under a Fi. Fa., 661.

EXECUTION. (*continued*).
In Civil Proceedings—(*continued*).
3.—Relative to the Mode of conducting the Execution under, 662.
4.—As to the Landlord's right to Rent under a Fi. Fa., 663.
5.—Relative to Pleading a Justification under a Fi. fa., 664.
4. Of the Elegit, 664.
5. Of the Levari Facias, 666.
6. Of the Venditioni Exponas, 666.
7. In inferior Courts, 666.
II. In Criminal Proceedings, 667.

TABLE OF CASES.

AARONS *v.* Williams, *Error, writ of* . 611
Abbott *v.* Kelly, *Distringas* . . . 478
Abercrombie *v.* Hickman, *Covenant* . 299
Abernethy *v.* Paton, *Costs* . . . 229
Abraham *v.* Cook, *Demurrer* . . . 403
Adams *v.* Brown, *Costs* 241
——— *v.* Gibmay, *Covenant* . . . 293
——— *v.* Grane, *Distress* . . . 447
Adamson *v.* Jarvis, *Contribution* . . 87
Adnam *v.* Wilks, *Error, writ of* . . 600
Aitman *v.* Conway, *Declaration* . . 367
Albin *v.* Toomer, *Costs* 261
Aldenburgh *v.* Peaple, *Distress* . . 452
Alderson *v.* Johnson, *Declaration* . . 359
Alderton *v.* St. Aubyn, *Execution* . 666
Aldridge, Ex parte, *Conviction* . . 91
Aleven *v.* Furnival, *Costs* . . . 244
Alexander *v.* Brown, *Evidence* . . 634
Alihin *v.* Hopkins, *Ecclesiastical persons* . 503
Alison *v.* Foster, *Driving* . . . 494
Allen *v.* Cameron, *Contract* . . . 49
—— *v.* Denstone, *Evidence* . . . 637
—— *v.* Flicker, *Distress* . . . 453
Allport *v.* Baldwin, *Costs* . . . 228
Allsop *v.* Smith, *Execution* . . . 656
Altroffe *v.* Lunn, *Declaration* . . . 356
Amos *v.* Hughes, *Contract* . . . 83
Anderson *v.* Passman, *Detinue* . 423, 424
——— *v.* Sherwin, *Costs* . . . 207
——— *v.* Thomas, *Declaration* . . 360
Andrews *v.* Marris, *Costs* . . . 239
——— *v.* Thornton, *Costs* . . . 227
Anon., (2 C. & J. 88), *Costs* . . . 234
———, (2 Tyrw. 501), *Covenant* . . 316
———, (1 D. P. C. 4), *Declaration* . . 358
———, (1 D. P. C. 81), *Distringas* . . 476
———, (1 D. P. C. 155), *Distringas* . 475
———, (1 D. P. C. 18), *Ejectment* . . 542
———, (3 M. & Scott, 751), *Ejectment* . 545
———, (1 D. P. C. 32), *Error, writ of* . 598
Apothecaries' Company *v.* Harrison, *Error, writ of* . . 591
Appleton *v* Braybrook, *Evidence* . . 645
Archbold *v.* Smith, *Error, writ of* . 595, 602
Archer *v.* Brindley, *Distringas* . . 472
——— *v.* March, *Covenant* . . . 302
Arden *v.* Mornington, *Covenant* . . 315
Armstrong *v.* Lewis, *Error, writ of* . . 606
——— *v.* Lewis, *Exceptions, bill of* . 646
Arnold *v.* Arnold, *Contract* . . . 65
——— *v.* Bishop of Bath and Wells, *Evidence* 640
Arundel *v.* Chitty, *Detainer* . . . 418
——— (Mayor of) *v.* Holmes, *Corporation* . . 207
Ashmore *v.* Hardy, *Distress* . . . 466
Aspinall *v.* Stamp, *Costs* . . . 254
Atkins *v.* Owen, *Evidence* . . . 629
Atkinson *v.* Bayntun, *Demurrer* . . 405
——— *v.* Bayntum, *Execution* . . 660
——— *v.* Clean, *Distringas* . . 473
——— *v.* Howell, *Distringas* . . 471
Attorney-General *v.* Barrell, *Excise and customs* . . 649
——— *v.* Lowe, *Excise and customs* . . . 650
——— *v.* Slee, *Excise and customs* . . . 649
——— *v.* Vondiere, *Excise and customs* . . 649

B.

Bacon *v.* Simpson, *Contract* . . . 62
Baden *v.* Flight, *Covenant* . . . 323
Badnall *v.* Hall, *Costs* 245
Bailey *v.* Bond, *Election* . . . 582
Baisley *v.* Newbold, *Declaration* . . 355
Baker *v.* Brown, *Damages* . . . 340
——— *v.* Rye, *Contempt* 22
Balguy *v.* Gardner, *Distringas* . . 477
Ball *v.* Ross, *Costs* 241
—— *v.* Strafford, *Deposit in lieu of bail* . 414
Ballinger *v.* Ferris, *Constable* . . 15
Bampton *v.* Paulen, *Deed* . . . 385
Barden *v.* Cox, *Execution* . . . 656
Barford *v.* Nelson, *Driving* . . . 496
——— *v.* Nelson, *Execution* . . . 656
Barker *v.* Gleadow, *Demurrer* . . 395
Barlow *v.* Rhodes, *Deed* . . . 379
Barnard *v.* Nerot, *Evidence* . . . 639
Barnett *v.* Glossop, *Copyright* . . 146
Barratt *v.* Price, *Detainer* . . . 418
Barry *v.* Arnaud, *Excise and Customs* . 648
Bartholomew *v.* Stephens, *Evidence* . 630
Bartlett *v.* Downes, *Copyhold, estate of* . 131
Bass *v.* Maitland, *Costs* 259
Basset *v.* Hartley, *Deposit in lieu of bail* . 412
Bastard *v.* Smith, *Custom* . . . 336
——— *v.* Trutch, *Execution* . . . 654
Basten *v.* Carew, *Distress* . . . 460
Bates *v.* Cort, *Contract* 67
—— *v.* Hudson, *Contract* . . . 58
Bayley *v.* Beaumont, *Costs* . . . 232
——— *v.* Homan, *Demurrer* . . . 405
——— *v.* Potts, *Execution* . . . 652
——— *v.* Thompson, *Declaration* . . 366
Baylis *v.* Fisher, *Distress* . . . 462
—— *v.* Strickland, *Corporation* . . 178
Beacon *v.* Cheshire, *Error, writ of* . . 592

Beamon *v.* Ellice, *Driving* . . . 496
Beckham *v.* Knight, *Costs* . . . 237
——— *v.* Knight, *Error, writ of* . . 605
Beckwith *v.* Philby, *Constable* . . 8
Bedford *v.* Britten, *Covenant* . . . 312
Beeston *v.* Beckett, *Declaration* . . 369
Beetham *v.* Gregg, *Ecclesiastical persons* 502
Begbie *v.* Crook, *Disclaimer* . . . 429
——— *v.* Hayne, *Distress* . . . 451
Beilby *v.* Roper, *Corporation* . . 190
Belcher *v.* M'Intosh, *Covenant* . . 300
Bellotti *v.* Barella, *Declaration* . . 357
Belshaw *v.* Marshall, *Error, writ of* . 597
Bendry *v.* Price, *Ecclesiastical persons* . 503
Bennett *v.* Robins, *Distress* . . . 441
——— *v.* Womack, *Covenant* . . 295
Benning *v.* Dove, *Contract* . . . 56
Bennington *v.* Owen, *Distringas* . . 470
Berdoe *v.* Blomfield, *Error, writ of* . 596
Berkeley *v.* Hardy, *Covenant* . . . 287
——— *v.* Watling, *Estoppel* . . 622
Bernall *v.* Weatherley, *Execution* . . 655
Berridge *v.* Priestly, *Demurrer* . . 397
Berwick (Mayor of) *v.* Shanks, *Covenant* 314
Best *v.* Prior, *Error, writ of* . . . 607
Bettyes *v.* Thompson, *Execution* . . 659
Beverley *v.* Craven, *Evidence* . . . 610
——— *v.* Lincoln Gas Company, *Corporation* 205
Biddell *v.* Dowse, *Equity* . . . 589
——— *v.* Jenner, *Dower* . . . 487
Bignold *v.* Springfield, *Corporation* . . 190
Billing *v.* Kightley, *Demurrer* . . 399
Binns *v.* Towsey, *Debtor and creditor* . 345
Birch *v.* Gibbs, *Covenant* . . . 320
Bird *v.* Relph, *Dilapidation* . . . 426
Birkett *v.* Holme, *Costs* 261
Bishop *v.* Bryant, *Distress* . . . 453
——— *v.* Hatch, *Ecclesiastical persons* . 503
Blake *v.* Warren, *Costs* 246
Blewitt *v.* Tregonning, *Custom* . 332, 334
Bligh *v.* Wellesley, *Evidence* . . . 628
Blofeld *v.* Payne, *Deceit* . . . 346
Blow *v.* Cox, *Deposit in lieu of bail* . 411
——— *v.* Wyatt, *Costs* 225
Blower *v.* Hollis, *Escape* . . . 618
Bloxsome *v.* Williams, *Contract* . . 61
Boddington *v.* Abernethy, *Copyhold, estate of* 122
Bodington *v.* Woodley, *Detainer* . . 420
Bohrs *v.* Sessions, *Costs* 243
Bolton *v.* Manning, *Distringas* . . 481
Bonnefor *v.* Russel, *Costs* . . . 233
Boomer *v.* Mellor, *Costs* . . . 262
Booth *v.* Macfarlane, *Double rent and double value* 484
——— *v.* Mister, *Driving* . . . 491
Borton *v.* Ockford, *Evidence* . . . 614
Boss *v.* Litton, *Driving* 492
Bottomley *v.* Bellchamber, *Costs* . . 261
——— *v.* Forbes, *Contract* . . 80
Bottrell *v.* Summers, *Deed* . . . 376
Bourne *v.* Rex, *Error, writ of* . . 593
Bousfield *v.* Godfrey, *Contract* . . 39
Bowen *v.* Bramidge, *Execution* . . 662
Bowler *v.* Nicholson, *Distress* . . 458
Bowles *v.* Bilton, *Declaration* . . 357
Bowring *v.* Stevens, *Deceit* . . . 350
Boydell *v.* Jones, *Demurrer* . . . 405
Boyes *v.* Hewetson, *Covenant* . . 315
Boys *v.* Arnell, *Covenant* . . . 320
——— *v.* Arnold, *Covenant* . . . 290
Brady *v.* Giles, *Driving* 493
Branston *v.* Robins, *Distress* . . . 439
Brant *v.* Robinson, *Deceit* . . . 351
Brashier *v.* Jackson, *Contract* . . 73
Brawley *v.* Wade, *Distress* . . . 440
Brazier *v.* Jones, *Escape* . . . 616
Brazil (Emperor of) *v.* Robinson, *Costs* . 240
Brett *v.* Beales, *Corporation* . . . 204
Bridge *v.* Wright, In re, *Costs* . . 220
Bridger *v.* Austen, *Declaration* . . 368
Bridges *v.* Smyth, *Ejectment* . . . 553
Briggs *v.* Aynsworth, *Driving* . . 496
Brisco *v.* Stevens, *Courts* . . . 277
British Museum *v.* Payne, *Copyright* 141
Britten *v.* Britten, *Demurrer* . . . 404
Broad *v.* M'Calmar, *Contract* . . . 80
Broadbent *v.* Ledward, *Detinue* . . 423
Brocher *v.* Pond, *Execution* . . . 654
Bromage *v.* Ray, *Distringas* . . . 478
Bromfield *v.* Jones, *Escape* . . . 616
Bromley *v.* Holden, *Distress* . . . 456
Brookbank *v.* Miers, *Execution* . . 664
Brooke *v.* Gunning, *Deposit in lieu of bail* 411
——— *v.* Noakes, *Distress* . . . 456
Brooker *v.* Field, *Constable* . . . 16
Brookes *v.* Cock, *Copyright* . . . 145
——— *v.* Humphreys, *Covenant* . . 317
——— *v.* Heberd, *Covenant* . . . 323
Brooks *v.* Bridges, *Ejectment* . . . 563
Brown *v.* Burtinshaw, *Contract* . . 47
——— *v.* Dean, *Contract* . . . 48
——— *v.* Granville, *Error, writ of* . . 591
——— *v.* Hudson, *Execution* . . . 659
——— *v.* Powell, *Distress* . . . 435
——— *v.* Shevill, *Distress* . . . 447
——— *v.* Windsor, *Easement* . . . 499
——— *v.* Woodman, *Evidence* . . 633
——— *v.* Wright, *Costs* 243
Browne *v.* Brown, *Error, writ of* . . 599
——— *v.* Joddrell, *Contract* . . . 62
Bruce *v.* Wait, *Court* 277
Bruyeres *v.* Halcomb, *Election* . . 581
Bryan *v.* Lewis, *Contract* . . . 58
——— *v.* Wagstaff, *Evidence* . . . 629
Buckenhorn *v.* Francis, *Execution* . . 664
Bucknall *v.* Boydell, *Costs* . . . 247
Bull *v.* Turner, *Deposit in lieu of bail* . 413
Bunts *v.* Poynter, *Costs* 246
Burdett *v.* Williams, *Covenant* . . 300
Burden *v.* Flower, *Demurrer* . . . 405
Burling *v.* Paterson, *Execution* . . 662
——— *v.* Paterson, *Deed* . . . 384
Burn *v.* Carvalho, *Error, writ of* . . 607
Burnett *v.* Lynch, *Deed* 386
Burton *v.* Barclay, *Covenant* . . . 290
——— *v.* Payne, *Evidence* . . . 630
Butt *v.* Burke, *Damages* 341
Buttery *v.* Robinson, *Distress* . . 438
Buzzard *v.* Capel, *Distress* . . . 446
Byrne *v.* Harvey, *Evidence* . . . 630

C.

Cahill *v.* M'Donald, *Costs* . . . 244
Caldwell *v.* Blake, *Declaration* . . 356
Capel *v.* Child, *Ecclesiastical persons* . 502
Carden *v.* General Cemetery Company, *Error, writ of* . . 605, 607

Cardwell *v.* Lucas, *Covenant* . . . 321
Carlile *v.* Garland, *Costs* . . . 222
Carmarthen (Mayor, &c., of) *v.* Lewis, *Corporation* . . . 203
Carnaby *v.* Welby, *Ejectment* . . . 568
Carne *v.* Legh, *Contract* . . . 82
Carpenter *v.* Blandford, *Contract* . . 54
——— *v.* Creswell, *Covenant* . . 285
Carruthers, Ex parte, *Coroner* . . 155
Carson *v.* Dowding, *Declaration* . . 357
Carter *v.* Carter, *Distress* . . . 458
——- *v.* Sanderson, *Corporation* . . 195
Cartwright *v.* Cock, *Costs* . . . 227
———- *v.* Smith, *Distress* . . 458
Casseldine *v.* Munday, *Execution* . . 665
Castledine *v.* Munday, *Error, writ of* . 601
Cats *v.* Howard, *Evidence* . . . 643
Chambers *v.* Bernasconi, *Evidence* . . 642
Channing *v.* Cross, *Distringas* . . 476
Chaplin *v.* Hawes, *Driving* . . . 491
Charington *v.* Meatheringhan, *Costs* . 221
Charleworth *v.* Rudgard, *Costs* . . 220
Charnock *v.* Lumley, *Contract* . . 82
Cheeswright *v.* Franks, *Execution* . . 666
Cheetham *v.* Crook, *Courts* . . . 282
Chevers *v.* Parkington, *Demurrer* . . 401
Chick *v.* Smith, *Execution* . . 659, 663
Child *v.* Chamberlain, *Distress* . . 468
—— *v.* Grace, *Evidence* . . . 638
Children *v.* Mannering, *Demurrer* . . 395
Chitty *v.* Dantry, *Courts* 280
Cholmeley *v.* Paxton, *Demurrer* . . 398
Cholmondeley *v.* Payne, *Declaration* . 365
Church *v.* Imperial Gas Co., *Corporation* 204
Clark *v.* Capp, *Evidence* . . . 628
Cleaver *v.* Hargrave, *Costs* . . . 253
Cleve *v.* Powell, *Evidence* . . . 636
Clapworthy *v.* Collier, *Costs* . . . 239
Clare *v.* Blakesley, *Contempt* . . . 21
Clark *v.* Le Cren, *Corporation* . . 193
Clarke *v.* The Imperial Gas Company, *Corporation* . . . 191
——- *v.* Webster, *Costs* . . . 228
Clayton *v.* Gregson, *Covenant* . . 306
——— *v.* Manham, *Distringas* . . 472
Cliffe *v.* Prosser, *Costs* 253
Cockerell *v.* Cholmeley, *Error, writ of* . 668
Cocks *v.* Nash, *Deed* 387
Cogg, Ex parte, *Detainer* . . . 420
Cole *v.* Beardy, *Costs* 242
—— *v.* Perry, *Costs* 242
Collins *v.* Beaumont, *Execution* . 658, 659
——- *v.* Carnegie, *Diploma* . . . 427
——- *v.* Gwynne, *Deposit in lieu of bail* 407
——- *v.* Maule, *Evidence* . . . 628
——- *v.* Rose, *Constable* . . . 17
——- *v.* Yewens, *Detainer* . . . 419
Commelin *v.* Thompson, *Demurrer* . . 405
Constable *v.* Fothergill, *Execution* . . 654
Cook *v.* Hunt, *Costs* . . . 250, 251
—— *v.* Nethercote, *Constable* . . 9
Cooke *v.* Johnson, *Declaration* . . 367
Cooper *v.* Folkes, *Distringas* . . 481
——— *v.* Gardner, *Execution* . . 664
——— *v.* Hawkes, *Demurrer* . . 404
Cope *v.* Cope, *Evidence* 632
Copeland *v.* Laporte, *Covenant* . . 286
———-- *v.* Neville, *Distringas* . 477, 480
Coppock *v.* Bower, *Contract* . . . 43
——— *v.* Bower, *Election* . . . 580
Corbett *v.* Brown, *Deceit* . . . 347
Corfield *v.* Parsons, *Evidence* . . . 645
Cornish *v.* King, *Distringas* . . . 481
Cornfoot *v.* Fowke, *Contract* . . . 76
Cosgrave *v.* Evans, *Costs* . . . 228
Coster *v.* Wilson, *Distress* . . . 457
Cottle *v.* Warrington, *Ecclesiastical persons* 504
Cousins *v.* Brown, *Escape* . . . 616
——— *v.* Paddon, *Contract* . . . 74
Cowlishaw *v.* Cheslyn, *Estoppel* . . 623
Cox *v.* Bent, *Distress* 411
—— *v.* Salman, *Costs* 259
—— *v.* Todd, *Contract* 50
Crabb *v.* Killick, *Distress* . . . 466
Crank *v.* Frith, *Deed* 385
Crease *v.* Barrett, *Evidence* . . . 638
Creswell *v.* Crisp, *Demurrer* . . . 401
Crisp *v.* Griffiths, *De injuriâ* . . . 391
Croft *v.* Miller, *Covenant* . . . 330
Crompton *v.* Stewart, *Covenant* . . 315
Crookes *v.* Longden, *Courts* . . . 281
Croome *v.* Guise, *Copyhold, estate of* . 135
Cross *v.* Badlett, *Exchange* . . . 647
—— *v.* Eglin, *Contract* . . . 46
—— *v.* Wilkins, *Distringas* . . . 473
Crowder *v.* Self, *Distress* . . . 458
Crowley *v.* Page, *Contract* . . . 83
Crowther *v.* Elwell, *Costs* . . . 223
Crozier *v.* Cundey, *Constable* . . . 10
Cuckson *v.* Winter, *Distress* . . . 460
Culley, In re, *Coroner* 160
——- *v.* Roe *d.* Taylerson, *Exceptions, bill of* 646
Cumberland *v.* Planché, *Copyright* . . 113
Cunningham *v.* Fonblanque, *Custom* . 336
Curtis *v.* Headfort (Marquis of) *De injuriâ* 392
—— *v.* Wheeler, *Distress* . . . 440
Cutler *v.* Close, *Contract* . . . 57

D.

Dalton *v.* Tucker, *Costs* 260
Dame *v.* Robson, *Evidence* . . . 639
Damer *v.* Langton, *Contract* . . . 79
Danell *v.* Bishop, *Costs* 253
Daniels *v.* Potter, *Evidence* . . . 637
——— *v.* Varity, *Distringas* . . . 480
Darker *v.* Darker, *Demurrer* . . . 403
Dartnall *v.* Howard, *Contract* . . 72
Daubuz *v.* Rickman, *Covenant* . . 330
Davidson *v.* Dunne, *Execution* . . 654
Davies *v.* Morgan, *Corporation* . . 195
——— *v.* Morgan, *Evidence* . . . 644
——— *v.* Sherlock, *Costs* . . . 260
——— *v.* Stanley, *Demurrer* . . . 400
Davis *v.* Brown, *Escape* . . . 620
—— *v.* Eyton, *Emblements* . . . 588
—— *v.* Chapman, *Escape* . . 617, 619
—— *v.* Gyde, *Distress* 459
—— *v.* Humphreys, *Contribution* . . 85
—— *v.* Jones, *Declaration* . . . 360
—— *v.* Nicholson, *Evidence* . . . 643
—— *v.* Sibley, *Conveyancer* . . . 89
Davy *v.* Brown, *Costs* 220
Dawes, Ex parte, *Coroner* . . . 157
Dawson *v.* Dyer, *Covenant* . . . 285
——— *v.* Parry, *Demurrer* . . . 402
Day *v.* Smith, *Costs* 236
Deacon *v.* Fuller, *Evidence* . . . 629
Dearden *v.* Evans, *Copyhold, estate of* . 136

De Bedolliere *v.* Ryan, *Deposit in lieu of bail* 413
De Grave *v.* Corporation of Monmouth, *Corporation* . . 190
Delegal *v.* Highley, *Demurrer* . . 406
Denman *v* Bull, *Costs* 231
Denn *v.* Roak, *Error, writ of* . . 611
Dennett *v* Pars, *Costs* 260
Denton *v.* Williams, *Costs* . . . 236
De Rossi *v.* Polhill, *Costs* . . . 245
De Vaux *v.* Sewell, *Escape* . . . 614
Devaux *v.* Steinkeller, *Deceit* . . 348
Dicas *v.* Warne, *Costs* . . . 256, 261
——— *v.* Warne, *Execution* . . . 658
Dickinson *v.* Goom, *Contract* . . . 64
Ditcher *v.* Kenrick, *Consent* . . . 327
Dobell *v.* King, *Distringas* . . . 470
——— *v.* Stevens, *Deceit* . . . 349
Dod *v.* Grant, *Courts* 276
——— *v.* Grant, *Declaration* . . . 370
Doe *v.* Adderley, *Ejectment* . . . 559
——— *v.* Barker, *Costs* 257
——— *v.* Birchmore, *Ejectment* . . 510
——— *v.* Bowles, *Ejectment* . . . 559
——— *v.* Caperton, *Copyhold, estate of* . 139
——— *v.* Carter, *Costs* 255
——— *v.* Caufield, *Costs* 258
——— *v.* Clark, *Error, writ of* . . . 606
——— *v.* Clarke, *Ejectment* . . . 558
——— *v.* Clifton, *Ejectment* . . . 520
——— *v.* Cockell, *Evidence* . . . 630
——— *v.* Cooper, *Disclaimer* . . . 427
——— *v.* Coulthred, *Evidence* . . . 636
——— *v.* Crisp, *Copyhold, estate of* . . 137
——— *v.* Dand, *Covenant* . . . 296
——— *v.* Davis, *Costs* 249
——— *v.* Edmonds, *Ejectment* . . . 511
——— *v.* Edwards, *Courts* . . . 276
——— *v.* Edwards, *Ejectment* . . 509, 537
——— *v.* Field, *Ejectment* . . . 539
——— *v.* Forbe, *Ejectment* . . . 530
——— *v* Francis, *Ejectment* . . . 555
——— *v.* Fry, *Costs* 257
——— *v.* Galard, *Evidence* . . . 641
——— *v.* Gee, *Ejectment* 546
——— *v.* Gibbons, *Copyhold, estate of* . 121
——— *v.* Goslee, *Evidence* . . . 644
——— *v.* Gunning, *Ejectment* . . . 522
——— *v.* Hodgson, *Evidence* . . . 631
——— *v.* Horn, *Ejectment* . . 518, 552
——— *v.* Jauncey, *Ejectment* . . . 514
——— *v.* Jordon, *Ejectment* . . . 552
——— *v.* Knebell, *Ejectment* . . . 516
——— *v.* Longdon, *Ejectment* . . . 568
——— *v.* Lord, *Ejectment* . . . 564
——— *v.* Mabberley, *Ejectment* . . 555
——— *v.* Macdonnell, *Ejectment* . . 560
——— *v.* Maple, *Corporation* . . . 207
——— *v.* Mellersh, *Copyhold, estate of* . 118
——— *v.* Meux, *Covenant* . . . 301
——— *v.* Meux, *Ejectment* . . . 553
——— *v.* Miller, *Ejectment* . . . 515
——— *v.* Mirehouse, *Execution* . . 658
——— *v.* Murrell, *Ejectment* . . 509, 559
——— *v.* Musgrave, *Ejectment* . . . 517
——— *v.* Newman, *Ejectment* . . . 518
——— *v.* Nutt, *Dower* 489
——— *v.* Owen, *Evidence* . . . 639
——— *v.* Patteshall, *Evidence* . . . 629
——— *v.* Pearce, *Ejectment* . . . 559
Doe *v.* Penfold, *Deed* 385
——— *v.* Perkins, *Estoppel* . . . 622
——— *v.* Pittman, *Disclaimer* . . . 428
——— *v.* Read, *Ejectment* . . . 529
——— *v.* Rees, *Encroachment* . . . 589
——— *v.* Roe, *Ejectment*, 519, 524, 526, 527, 528, 530, 533, 535, 536, 540, 542, 545, 547
——— *v.* Shadwell, *Ejectment* . . 566
——— *v.* Skirrow, *Estoppel* . . . 622
——— *v.* Smart, *Ejectment* . . . 558
——— *v.* Smith, *Ejectment* . . . 563
——— *v.* Stacey, *Ejectment* . . . 555
——— *v.* Stacey, *Evidence* . . . 638
——— *v.* Samples, *Deed* 385
——— *v.* Thompson, *Copyhold, estate of* . 123
——— *v.* Thompson, *Ejectment* . . 512
——— *v.* Tooth, *Corporation* . . . 203
——— *v.* Tresidder, *Ejectment* . . . 515
——— *v.* Trye, *Escape* 613
——— *v.* Wainwright, *Ejectment* . . 511
——— *v.* Wainwright, *Evidence* . . 637
——— *v.* Wells, *Ejectment* . . 515, 520
——— *v.* Wheeler, *Deed* 381
——— *v.* Wheeler, *Ejectment* . . . 516
——— *v.* Wilkins, *Deed* 386
——— *v.* Wilkins, *Ejectment* . . . 513
——— *v.* Williams, *Ejectment* . . . 525
——— *v* Wilson, *Ejectment* . . . 558
——— *v.* Wing, *Ejectment* . . . 513
——— *d.* Abdy *v.* Stevens, *Covenant* . . 296
——— *d.* Agar *v.* Roe, *Ejectment* . . 529
——— *d.* Ambler *v.* Woodbridge, *Covenant* 308
——— *d.* Ashman *v.* Roe, *Ejectment* . 519
——— *d.* Avery *v.* Roe, *Ejectment* . . 540
——— *d.* Bank of England *v.* Chambers, *Deed* . 378
——— *d.* Bank of England *v.* Chambers, *Ejectment* 560
——— *d.* Baring *v.* Roe, *Ejectment* . . 532
——— *d.* Barker *v.* Goldsmith, *Ejectment* . 515
——— *d.* Barles *v.* Roe, *Ejectment* . . 547
——— *d.* Barrow *v.* Roe, *Ejectment* . . 526
——— *d.* Bath *v.* Roe, *Ejectment* . . 560
——— *d.* Batten *v.* Murless, *Evidence* . 642
——— *d.* Beadon *v.* Roe, *Ejectment* . . 547
——— *d.* Beanland *v.* Hirst, *Deed* . . 381
——— *d.* Beanland *v.* Hirst, *Ejectment* . 566
——— *d.* Beard *v.* Roe, *Ejectment* . . 525
——— *d.* Biass *v.* Horsley, *Ejectment* . 514
——— *d.* Birtwhistle *v.* Vardill, *Descent* . 415
——— *d.* Bishton *v.* Hughes, *Ejectment* 537, 562
——— *d.* Blackburn *v.* Blackburn, *Escheats* 621
——— *d.* Blair *v.* Street, *Ejectment* . . 531
——— *d.* Blight *v.* Pitt, *Ejectment* . . 522
——— *d.* Bloxam *v.* Roe, *Ejectment* . . 520
——— *d.* Boullott *v.* Roe, *Ejectment* . . 527
——— *d.* Bover *v.* Trueman, *Copyhold, estate of* . . . 129
——— *d.* Boys *v.* Carter, *Ejectment* . . 522
——— *d.* Bracebridge, *Ejectment* . . 545
——— *d.* Bremner *v.* Roe, *Ejectment* . 527
——— *d.* Brent *v.* Roe, *Ejectment* . . 525
——— *d.* Briggs *v.* Roe, *Ejectment* . . 545
——— *d.* Brittlebank *v.* Roe, *Ejectment* . 529
——— *d.* Bromley *v.* Roe, *Ejectment* . 533
——— *d.* Bullen *v.* Mills, *Estoppel* . . 622
——— *d.* Burrows *v.* Roe, *Ejectment* . 530
——— *d.* Butcher *v.* Musgrave, *Estoppel* . 624
——— *d.* Byne *v.* Brewer, *Ejectment* . 554

Doe *d.* Calvert *v.* Frowd, *Disclaimer* . 428
—— *d.* Calvert *v.* Reid, *Covenant* . . 303
—— *d.* Carlisle (Lord) *v.* Towns, *Copyhold, estate of* 123
—— *d.* Caulfield *v.* Roe, *Ejectment* . 540
—— *d.* Chaffey *v.* Roe, *Ejectment* . . 529
—— *d.* Channel *v.* Roe, *Ejectment* . 519
—— *d.* Chapeau *v.* Reynolds, *Copyhold, estate of* . . 139
—— *d.* Clothier *v.* Roe, *Ejectment* . 533
—— *d.* Cockburn *v.* Roe, *Ejectment* . 529
—— *d.* Collins, *Ejectment* . . . 534
—— *d.* Colnaghi *v.* Bligh, *Costs* . . 238
—— *d.* Colson *v.* Roe, *Ejectment* . . 532
—— *d.* Coopers' Comp. *v.* Roe, *Ejectment* 533
—— *d.* Counsell *v.* Caperton, *Deed* . 386
—— *d.* Counsell *v.* Caperton, *Ejectment* . 513
—— *d.* Courtail *v.* Thomas, *Deed* . 388
—— *d.* Courthope *v.* Roe, *Ejectment* . 534
—— *d.* Cousins *v.* Roe, *Ejectment* . 535
—— *d.* Coyle *v.* Cole, *Ejectment* . . 517
—— *d.* Coyles *v.* Cole, *Evidence* . . 612
—— *d.* Crooks *v.* Roe, *Ejectment* . . 547
—— *d.* Croone *v.* Roe, *Ejectment* . . 550
—— *d.* Dalton *v.* Jones, *Covenant* . . 301
—— *d.* Dangerfield *v.* Allsop, *Costs* . 254
—— *d.* Daniel *v.* Woodroffe, *Ejectment* . 526
—— *d.* Danson *v.* Parke, *Copyhold, estate of* . . . 125
—— *d.* Darrant *v.* Roe, *Ejectment* . . 530
—— *d.* Darwent *v.* Roe, *Ejectment* . 524
—— *d.* Davies *v.* Creed, *Ejectment* . 551
—— *d.* Davies *v.* Creed, *Execution* . 665
—— *d.* Davis *v.* Davis, *Ejectment* . 510
—— *d.* Davis *v.* Roe, *Ejectment* . 523, 547
—— *d.* Dearden *v.* Maden, *Deed* . . 579
—— *d.* Dickins *v* Roe, *Ejectment* . . 533
—— *d.* Dinorben (Lord) *v.* Roe, *Ejectment* 530
—— *d.* Downes *v.* Roe, *Ejectment* . . 535
—— *d.* Durant *v.* Moore, *Ejectment* 540, 567
—— *d.* Eaton *v.* Roe, *Ejectment* . . 529
—— *d.* Edmunds *v.* Llewellin, *Copyhold, estate of* . . 113
—— *d.* Elwood *v.* Roe, *Ejectment* . . 531
—— *d.* Emery *v.* Roe, *Ejectment* . . 550
—— *d.* Errington *v.* Errington, *Ejectment* 562
—— *d.* Evans *v.* Evans, *Copyhold, estate of* 128
—— *d.* Evans *v.* Owen, *Execution* . . 665
—— *d.* Evans *v.* Roe, *Ejectment* . . 519
—— *d.* Faithful *v.* Roe, *Ejectment* . . 567
—— *d.* Falmouth (Earl) *v.* Alderson, *Ejectment* . . 517
—— *d.* Finch *v.* Roe, *Ejectment* . . 535
—— *d.* Flower *v.* Peck, *Covenant* . . 292
—— *d.* Folkes *v.* Roe, *Ejectment* . . 526
—— *d.* Foster *v.* Derby (Earl of), *Ejectment* 557
—— *d.* Foster *v.* Roe, *Ejectment* . . 535
—— *d.* Foster *v.* Scott, *Copyhold, estate of* 115
—— *d.* Fraser *v.* Roe, *Ejectment* . . 526
—— *d.* Frith *v.* Roe, *Ejectment* . 527, 544
—— *d.* Frodsham *v.* Roe, *Ejectment* . 546
—— *d.* Frost *v.* Roe, *Ejectment* 523, 529, 544
—— *d.* Fry *v.* Roe, *Ejectment* . . 519
—— *d.* Garnons *v.* Knight, *Deed* . . 378
—— *d.* Garrod *v.* Olley, *Copyhold, estate of* 139
—— *d.* George *v.* Roe, *Ejectment* . 529, 544
—— *d.* Ghrimes *v.* Roe, *Ejectment* . 532
—— *d.* Gilbert *v.* Ross, *Evidence* . . 627
Doe *d.* Gilbert *v.* Ross, *Ejectment* . . 516
—— *d.* Giles *v.* Roe, *Ejectment* . . 549
—— *d.* Gillett *v.* Roe, *Ejectment* . . 518
—— *d.* Glynn *v.* Roe, *Ejectment* . . 547
—— *d.* Goodwin *v.* Roe, *Ejectment* . 519
—— *d.* Gore *v.* Roe, *Ejectment* . . 523
—— *d.* Gowland *v.* Roe, *Ejectment* 519, 540
—— *d.* Graef *v.* Roe, *Ejectment* . . 527
—— *d.* Graham *v.* Penfold, *Evidence* . 645
—— *d.* Graves *v.* Wells, *Disclaimer* . 428
—— *d.* Gray *v.* Roe, *Ejectment* . . 533
—— *d.* Gray *v.* Stanion, *Disclaimer* . 429
—— *d.* Greaves *v.* Raby, *Ejectment* . 560
—— *d.* Green *v.* Roe, *Ejectment* . 519, 523
—— *d.* Grubb *v.* Burlington (Earl of), *Copyhold, estate of* . 127
—— *d.* Grubb *v.* Grubb, *Ejectment* . 513, 569
—— *d.* Haden *v.* Burton, *Evidence* . . 643
—— *d.* Haines *v.* Roe, *Ejectment* . . 518
—— *d.* Harding *v.* Cooke, *Ejectment* . 513
—— *d.* Harris *v.* Roe, *Ejectment* . . 534
—— *d.* Harrison *v.* Roe, *Ejectment* . 527
—— *d.* Harvey *v.* Francis, *Costs* . . 249
—— *d.* Harvey *v.* Francis, *Ejectment* . 509
—— *d.* Hawthorne *v.* Mee, *Copyhold, estate of* . . 138
—— *d.* Heighley *v.* Hasland, *Ejectment* . 568
—— *d.* Hewson *v.* Roe, *Ejectment* . 533
—— *d.* Hindle *v.* Roe, *Ejectment* . . 548
—— *d.* Hogg *v.* Tindal, *Ejectment* . 560
—— *d.* Holder *v.* Rushworth, *Ejectment* 539, 540
—— *d.* Horton *v.* Rhys, *Ejectment* . 551
—— *d.* Hudson *v.* Jameson, *Ejectment* . 561
—— *d.* Hughes *v.* Dyball, *Ejectment* . 513
—— *d.* Hungate *v.* Roe, *Ejectment* . 536
—— *d.* Hunter *v.* Roe, *Ejectment* . . 532
—— *d.* Hutchinson *v.* Roe, *Ejectment* . 534
—— *d.* Ingram *v.* Roe, *Ejectment* . . 547
—— *d.* Irwin *v.* Roe, *Ejectment* . . 521
—— *d.* Isherwood *v.* Roe, *Ejectment* . 524
—— *d.* Jackson *v.* Roe, *Ejectment* . 535
—— *d.* James *v.* Stanton, *Ejectment* . 531
—— *d.* Jenkins *v.* Roe, *Ejectment* . 536
—— *d.* Jenks *v.* Roe, *Ejectment* . . 536
—— *d.* Johnson *v.* Baytrup, *Ejectment* . 510
—— *d.* Jones *v.* Roe, *Ejectment* . 535, 536
—— *d.* Jordan *v.* Roe, *Ejectment* . . 535
—— *d.* Kerr *v.* Roe, *Ejectment* . . 550
—— *d.* Kerschner *v.* Roe, *Ejectment* . 533
—— *d.* King *v.* Robinson, *Costs* . . 252
—— *d.* Lacy *v.* Bennet, *Ejectment* . 564
—— *d.* Lambert *v.* Roe, *Ejectment* . 564
—— *d.* Lauford *v.* Roe, *Ejectment* . 547
—— *d.* Lawrie *v.* Dyeball, *Ejectment* . 521
—— *d.* Leach *v.* Whitaker, *Copyhold, estate of* 113, 124, 126, 132
—— *d.* Levi *v.* Roe, *Ejectment* . . 536
—— *d.* Lewis *v.* Lord Cawdor, *Disclaimer* 427
—— *d.* Lewis *v.* Coles, *Ejectment* . . 562
—— *d.* Lewis *v.* Preece, *Ejectment* . 560
—— *d.* Llandesilio (Overseers of) *v.* Roe, *Declaration* . 365
—— *d.* Lloyd *v.* Bennett, *Deed* . 376, 377
—— *d.* Ludford *v.* Roe, *Ejectment* . 523
—— *d.* Luff *v.* Roe, *Ejectment* . . 528
—— *d.* Main *v.* Roe, *Ejectment* . . 529
—— *d.* Majoribanks *v.* Green, *Ejectment* 555
—— *d.* Manton *v.* Austen, *Ejectment* . 509
—— *d.* Marchant *v.* Errington, *Estoppel* 623

Doe *d.* Marshall *v.* Roe, *Ejectment* . 528
—— *d.* Martin *v.* Packer, *Ejectment* . 569
—— *d.* Masters *v.* Gray, *Ejectment* . 563
—— *d.* Mather *v.* Roe, *Ejectment* . . 529
—— *d.* Mayhew *v.* Asby, *Ejectment* . 567
—— *d.* Mee *v.* Litherland, *Disclaimer* . 428
—— *d.* Messer *v.* Roe, *Ejectment* . . 523
—— *d.* Meyrick *v.* Meyrick, *Deed* . 380
—— *d.* Meyrick *v.* Roe, *Ejectment* . 551
—— *d.* Mingay *v.* Roe, *Ejectment* . . 527
—— *d.* Morgan *v.* Roe, *Ejectment* . 546, 566
—— *d.* Morgan *v.* Rotheram, *Ejectment* . 539
—— *d.* Morpeth *v.* Roe, *Ejectment* . 529
—— *d.* Morris *v.* Williams, *Ejectment* . 524
—— *d.* Mortlake *v.* Roe, *Ejectment* . 525
—— *d.* Mudd *v.* Roe, *Ejectment* . . 568
—— *d.* Mullarky *v.* Roe, *Ejectment* . 548
—— *d.* Musselwhite *v.* Roe, *Ejectment* . 548
—— *d.* Nash *v.* Birch, *Covenant* . . 308
—— *d.* Nash *v.* Roe, *Ejectment* . . 527
—— *d.* Norman *v.* Roe, *Ejectment* . 544
—— *d.* Norris *v.* Roe, *Ejectment* . . 544
—— *d.* Oldham *v.* Roe, *Ejectment* . . 535
—— *d.* Osbaldiston *v.* Roe, *Ejectment* . 432
—— *d.* Packer *v.* Hilliard, *Execution* . 656
—— *d.* Peach *v.* Roe, *Ejectment* . . 523
—— *d.* Pearson *v.* Rees, *Deed* . . 388
—— *d.* Pemberton *v.* Roe, *Ejectment* . 539
—— *d.* Philips *v.* Morris, *Ejectment* . 555
—— *d.* Poole *v.* Evrington, *Ejectment* . 522
—— *d.* Postlewhaite *v.* Neale, *Discontinuance* . 432
—— *d.* Potter *v.* Roe, *Ejectment* . . 527
—— *d.* Prescott *v.* Roe, *Costs* . . 219
—— *d.* Priestley *v.* Calloway, *Copyhold, estate of* . . . 118
—— *d.* Protheroe *v.* Roe, *Ejectment* . 528
—— *d.* Pryme *v.* Roe, *Ejectment* . . 539
—— *d.* Pugh *v.* Roe, *Ejectment* . . 530
—— *d.* Rigby *v.* Roe, *Ejectment* . 532, 547
—— *d.* Roberts *v.* Roberts, *Costs* . . 239
—— *d.* Roberts v. Roe, *Ejectment* . . 523
—— *d.* Robinson *v.* Roe, *Ejectment* . 530
—— *d.* Rogers *v.* Bath, *Ejectment* . . 521
—— *d.* Ross *v.* Roe, *Ejectment* . 531, 533
—— *d.* Rutzen *v.* Lewis, *Ejectment* . 515
—— *d.* Sanders *v.* Roe, *Ejectment* . . 538
—— *d.* Scales v. Bragg, *Deed* . . 388
—— *d.* Schovell *v.* Roe, *Ejectment* . 542
—— *d.* Scott *v.* Roe, *Ejectment* . . 531
—— *d.* Shelton *v.* Shelton, *Copyhold, estate of* . . . 117
—— *d.* Shelton *v.* Shelton, *Estoppel* . 634
—— *d.* Simpson *v.* Roe, *Ejectment* . 520
—— *d.* Slee *v.* Roe, *Ejectment* . . 548
—— *d.* Smith *v.* Glenfield, *Copyhold, estate of* . . . 125
—— *d.* Smith *v.* Hardy, *Ejectment* . 569
—— *d.* Smith *v.* Roe, *Ejectment* . 528, 547
—— *d.* Smith *v.* Webber, *Ejectment* . 562
—— *d.* Smithers *v.* Roe, *Ejectment* . 549
—— *d.* Snape *v.* Snape, *Ejectment* . . 552
—— *d.* Summerville *v.* Roe, *Ejectment* . 544
—— *d.* Somers (Lord) *v.* Roe, *Ejectment* 533
—— *d.* Stainton *v.* Roe, *Ejectment* . . 520
—— *d.* Standish *v.* Roe, *Ejectment* . 569
—— *d.* Stanfield *v.* Shipley, *Ejectment* . 570
—— *d.* Stevens *v.* Lord, *Ejectment* . . 562
—— *d.* Strode *v.* Seaton, *Ejectment* 510, 556
—— *d.* Summers *v.* Roe, *Ejectment* . . 532
Doe *d.* Sweeting *v.* Hellard, *Copyhold, estate of* . . 114, 138
—— *d.* Sykes *v.* Roe, *Ejectment* . . 529
—— *d.* Symes *v.* Roe, *Ejectment* . . 523
—— *d.* Tansley *v.* Roe, *Ejectment* . . 563
—— *d.* Tattersall *v.* Roe, *Ejectment* . 518
—— *d.* Taylor *v.* Harris, *Ejectment* 568, 569
—— *d.* Thompson *v.* Roe, *Ejectment* . 550
—— *d.* Thomson *v.* Roe, *Ejectment* . 546
—— *d.* Thorn *v.* Roe, *Ejectment* . . 549
—— *d.* Tibbs *v.* Roe, *Ejectment* . . 528
—— *d.* Tims *v.* Jordon, *Ejectment* . . 557
—— *d.* Timmins *v.* Roe, *Ejectment* . 528
—— *d.* Tindal *v.* Roe, *Ejectment* . . 538
—— *d.* Tindal *v.* Roe, *Evidence* . . 637
—— *d.* Tooth, *Ejectment* . . . 559
—— *d.* Topping *v.* Boast, *Ejectment* . 540
—— *d.* Treat *v.* Roe, *Ejectment* . . 529
—— *d.* Tucker *v.* Roe, *Ejectment* . . 536
—— *d.* Tucker *v.* Tucker, *Ejectment* . 558
—— *d.* Tyndale *v.* Heming, *Deed* . . 386
—— *d.* Ubele *v.* Kilner, *Deed* . . 384
—— *d.* Vernon *v.* Roe, *Ejectment* . . 549
—— *d.* Vincent *v.* Roe, *Ejectment* . . 519
—— *d.* Visger *v.* Roe, *Ejectment* . . 530
—— *d.* Wade *v.* Roe, *Ejectment* . . 547
—— *d.* Wainwright, *Ejectment* . . 557
—— *d.* Walker *v.* Roe, *Ejectment* 527, 549
—— *d.* Warne *v.* Roe, *Ejectment* . . 523
—— *d.* Warren *v.* Bray, *Ejectment* . . 558
—— *d.* Watts *v.* Morris, *Ejectment* . 512
—— *d.* Watts *v.* Roe, *Ejectment* . 523, 539
—— *d.* Weeks *v.* Roe, *Ejectment* . . 535
—— *d.* Welkin *v.* Roe, *Ejectment* . . 546
—— *d.* Wells *v.* Roe, *Ejectment* . . 552
—— *d.* Were *v.* Cole, *Deed* . . . 380
—— *d.* Wetherall *v.* Bird, *Evidence* . . 641
—— *d.* Wetherell *v.* Bond, *Covenant* 300, 303
—— *d.* Wetherell *v.* Roe, *Ejectment* . 528
—— *d.* Whalhead *v.* Ossingbrooke, *Copyhold, estate of* . 121
—— *d.* Wheelden *v.* Paul, *Deed* . . 384
—— *d.* Whitaker *v.* Hales, *Ejectment* . 516
—— *d.* White v. Roe, *Ejectment* . 516, 533
—— *d.* Wiggs *v.* Roe, *Ejectment* . . 550
—— *d.* William *v.* Roe, *Ejectment* . . 527
—— *d.* Williamson *v.* Dawson, *Ejectment* 565
—— *d.* Williamson *v.* Roe, *Ejectment* . 534
—— *d.* Wills *v.* Roe, *Ejectment* . . 519
—— *d.* Wilson *v.* Smith, *Ejectment* . 528
—— *d.* Wright *v.* Nepean, *Ejectment* . 565
—— *d.* Wright *v.* Roe, *Ejectment* . . 530
—— *d.* Younghusband *v.* Roe, *Ejectment* 546
Douglas *v.* Stanhough, *Deposit in lieu of bail* 413
Dowling *v.* Hadman, *Costs* . . . 236
——— *v.* Harrison, *Costs* . . . 243
Drinkwater *v.* Porter, *Evidence* . . 632
Duckworth *v.* Fogg, *Execution* . . 652
Dufferin's (Lord) Case, *Evidence* . . 641
Duman *v.* Passenger, *Declaration* . . 359
Dunnage *v.* Kemble, *Distress* . . . 467
Dunstan *v.* Imperial Gas Company, *Corporation* 188
Du Prè *v.* Langridge, *Declaration* . . 360

E.

Eades *v.* Everall, *Costs* 255

East India Company *v.* Baker, *East India Dock* . 500
East London Waterworks Company *v.* Bailey, *Corporation* . . . 204
Eastmure *v.* Lawes, *Estoppel* . . 623
Edgington *v.* Proudman, *Discontinuance* 431
Edinburgh and Leith Company *v.* Dawson, *Costs* 233
Edmonds *v.* Harris, *Contract* . . . 74
Edmund *v.* Cates, *Costs* 245
Edwards *v.* Bagster, *Contract* . . . 47
——— *v.* Brown, *Costs* . . . 232
——— *v.* Chapman, *Contract* . . 77
——— *v.* Cooper, *Evidence* . . . 641
——— *v.* Farebrother, *Execution* . . 661
——— *v.* Rees, *Covenant* . . . 329
Efford *v.* Burgess, *Distress* . . . 459
Ellis *v.* Thomson, *Contract* . . . 50
Elliott *v.* Kendrick, *Costs* . . . 239
Elvin *v.* Drummond, *Costs* . . . 248
——— *v.* Drummond, *Escape* . . 615, 616
Elworthy *v.* Bird, *Discontinuance* . . 430
Ely (Dean of) *v.* Caldecott, *Copyhold, estate of* . 133, 139, 634
Emery *v.* Clarke, *Driving* . . . 495
Englehart *v.* Dunbar, *Execution* . . 655
Erdy *v.* Martin, *Execution* . . . 654
Esdaile *v.* Davis, *Execution* . . . 659
——— *v.* Manhall, *Distringas* . . 474
Ess *v.* Truscott, *Contract* . . . 59
Evans *v.* Curtis, *Evidence* . . . 628
——— *v.* Fry, *Distringas* . . . 475
——— *v.* Getting, *Evidence* . . . 642
——— *v.* Maners, *Escape* . . . 618
——— *v.* Ogilvie, *Custom* . . . 335
——— *v.* Pugh, *Execution* . . . 651
——— *v.* Swete, *Error, writ of* . . 591
——— *v.* Whitehead, *Declaration* . . 357
Everingham *v.* Roundell, *Evidence* . . 628
Evering *v.* Chiffenden, *Costs* . . . 235
Ewer *v.* Ambrose, *Evidence* . . . 639
Eyre *v.* Thorpe, *Costs* . . . 222, 224

F.

Fairlie *v.* Denton, *Debtor and creditor* . 344
——— *v.* Parker, *Costs* . . . 217
Fall *v.* Teale, *Costs* 262
Falmouth (Earl of) *v.* Moss, *Covenant* . 327
Faname *v.* Hill, *Costs* 214
Fanshawe *v.* Heard, *Discontinuance* . 432
Farmer *v.* Champneys, *Declaration* . 359
Farncombe *v.* Kent, *Execution* . . 657
Farr *v.* Hollis, *County clerk* . . . 267
Fector *v.* Beacon, *Election* . . . 578
Fellowes *v.* Williamson, *Deceit* . . 350
Fenn *d.* Thomas *v.* Griffith, *Ejectment* . 556
Fenton *v.* Logan, *Distress* . . . 446
Fenwick *v.* Laycock, *Contract* . . 78
——— *v.* Thornton, *Evidence* . . 637
Ferguson *v.* Mitchell, *Declaration* . . 361
Ferneley *v.* Worthingham, *Corporation* . 202
Ferrall *v.* Alexander, *Deposit in lieu of bail* 412
Ferrers (Earl of) *v.* Robins, *Costs* . . 240
Field *v.* Besant, *Costs* 257
—— *v.* Flemming, *Evidence* . . . 636
—— *v.* Morgan, *Evidence* . . . 636
—— *v.* Rudden, *Distringas* . . . 470
Fielder *v.* Ray, *Contract* . . . 81
Filewood *v.* Clement, *Escape* . . . 611
Finch *v.* Brook, *Error, court of* . 594, 607
Firmin *v.* Crucifix, *Demurrer* . . . 400
——— *v.* Crucifix, *Evidence* . . . 636
Fisher *v.* Algar, *Distress* . . . 462
——— *v.* Davies, *Execution* . . . 656
——— *v.* Ford, *Deed* 383
——— *v.* Goodurn, *Distringas* . . 471
——— *v.* Snow, *Demurrer* . . . 404
Fish *v.* Palmer, *Declaration* . . . 354
Fitch *v.* Green, *Costs* 229
Fitz *v.* Rabbits, *Evidence* . . . 628
Fleming *v.* Gooding, *Estoppel* . . 622
Fletcher *v.* Law, *Costs* 233
——— *v.* Saunders, *Distress* . . 453
Flight *v.* Glossop, *Covenant* . . . 292
——— *v.* Glossop, *Demurrer* . . 404, 503
Flinn *v.* Calow, *Deed* 381
Forbes *v.* King, *Costs* 222
Foreman *v.* Jeyes, *Execution* . . . 653
Foster *v.* Charles, *Deceit* . . . 347
Fox *v.* Jones, *Escape* 619
France *v.* Parry, *Error, writ of* . . 604
——— *v.* Wright, *Costs* . . . 259
Francis *v.* Roe, *Error, writ of* . . 610
Fraser *v.* Shaw, *Declaration* . . . 366
Freeman *v.* Pagani, *Deposit in lieu of bail* 410
French v. Burton, *Costs* . . . 226
Frese *v.* Thompson, *Damages* . . 341
Frodsham *v.* Myers, *Costs* . . . 236
Fry *v.* Rogers, *Declaration* . . . 368
—— *v.* Wells, *Ejectment* . . . 560
Fuller *v.* Coombe, *Error, writ of* . . 599
Furnival *v.* Stringer, *Costs* . . . 262

G.

Gainsford *v.* Carroll, *Contract* . . . 73
Gale *v.* Winkes, *Distringas* . . . 482
Gambrell *v.* Falmouth (Earl of) . 453, 457
Gardiner *v.* Williamson, *Distress* . . 661
Gardner *v.* Rickie, *Costs* . . . 209
Garland *v.* Jekyll, *Copyhold, estate of* . 134
Garner *v.* Weller, *Declaration* . . 369
Garnett *v.* Ferrand, *Coroner* . . . 158
Garrid, Ex parte, *Declaration* . . . 419
Gaskell *v.* Marshall, *Execution* . . 662
Gaslight and Coke Company *v.* Turner, *Covenant* 298
Gateshead (Justices) In re, *Corporation* . 197
Gaunt *v.* Wainnan, *Dower* . . . 489
Gazler *v.* Fraser, *Costs* 235
Geach *v.* Coppen, *Deposit in lieu of bail* . 411
Geast *v.* Elwes, *Escape* 620
Gervas *v.* Burtchley, *Execution* . . 656
Gibbs *v.* Trevanion, *Error, writ of* . . 593
Gilbert *v.* Kirkland, *Declaration* . . 366
Giles *v.* Herring, *Declaration* . . 368
Gillett *v.* Abbott, *Deed* 388
Gillingham *v.* Myers, *Error, writ of* . 599
Gillon *v.* Lillie, *Covenant* . . . 289
Gladwell *v.* Blake, *Constable* . . . 11
Glattan, In re, *Execution* . . . 666
Gleddow *v.* Atkin, *Evidence* . . . 643
Gledstone *v.* Hewitt, *Detinue* . . 422
Godmanchester (Bailiff) *v.* Phillips, *Corporation* 204
Godolphin *v.* Tudor, *Demurrer* . . 400
Gondell *v.* Rogers, *Error, writ of* . . 603
Good *v.* Wilks, *Contempt* . . . 24
Gooday *v.* Clark, *Election* . . . 574

Goodburne *v.* Bowman, *Costs* . . 221
Goodenough *v.* Butler, *Discontinuance* . 430
Goodman *v.* Kennell, *Driving* . . 494
——— *v.* Taylor, *Driving* . . . 495
Goodtitle *d.* Dodwell *v.* Gibbs, *Deed* . 380
Gorbell *v.* Archer, *Contract* . . . 84
Gordon *v.* Jenny, *Election* . . . 580
Gosling *v.* Duke, *Declaration* . . 355
Gould *v.* Oliver, *Costs* 216
Gougenheim *v.* Lane, *Costs* . . . 224
Gough *v.* Bryan, *Driving* . . . 496
Gower *v.* Von Dedalzen, *Contract* . . 77
Grace *v.* Morgan, *Distress* . . . 467
Grainger *v.* Taunton, *Corporation* . . 178
Grant *v.* Smith, *Error, writ of* . . 602
——— *v.* Wainman, *Estoppel* . . . 622
——— *v.* Willis, *Deposit in lieu of bail* . 413
Graves *v.* Colby, *Corporation* . . . 197
Gray *v.* Pennell, *Declaration* . . 356
Greece (King of) *v.* Wright, *Costs* . 236
Gregory *v.* Eldridge, *Costs* . . . 241
Green *v.* Bartram, *Debtor and creditor* . 345
——— *v.* Foster, *Execution* . . . 660
——— *v.* Glasscock, *Deposit in lieu of bail* 409
——— *v.* James, *Covenant* . . . 327
——— *v.* Light, *Costs* 262
——— *v.* Miller, *Error, writ of* . . 604
——— *v.* Smith, *Error, writ of* . . 592
Greenwood *v.* Dyer, *Contempt* . . 22
Griffin *v.* Yeates, *De injuriâ* . . . 389
Griffith *v.* Humphrys, *Declaration* . . 355
Griffiths *v.* Harries, *Conviction* . . 94
Grindall *v.* Godman, *Costs* . . . 252
Grindley *v.* Thorn, *Distringas* . . . 475
Gronow *v.* Pointer, *Costs* . . . 242
Groombridge *v.* Fletcher, *Execution* . 663
Grounsell *v.* Lamb, *Contract* . . . 79
Grover *v.* Heath, *Contributions* . . 87
——— *v.* Hindmarsh, *Distringas* . . 475
——— *v.* Wild, *Emblements* . . . 588
Guest *v.* Cleves, Ex parte, *Escape* . . 620
Gully *v.* Bishop of Exeter, *Deed* . . 382
———————, *Evidence* . . 640
Gurney *v.* Key, *Costs* 235
Guthridge *v.* Manyard, *Covenant* . . 300
Gwynne *v.* Collins, *Error, writ of* . . 608
——— *v.* Davy, *Contract* . . . 63
——— *v.* Thynne (Lord), *Error, writ of* 612
Gwillin *v.* Daniell, *Contract* . . . 72

H.

Hall *v.* Bainbridge, *Covenant* . . . 288
——— *v.* Champneys, *Deposit in lieu of bail* 409
——— *v.* Farrar, *De injuriâ* . . . 389
——— *v.* Franklin, *Ecclesiastical persons* . 501
——— *v.* Grimple, *Distringas* . . . 470
——— *v.* Popplewell, *Demurrer* . . 399
Haller *v.* Smith, *Costs* 251
Hams *v.* Pugh, *Execution* . . . 664
Hamer *v.* Anderton, *Demurrer* . . 18
Hancock *v.* Hodgson, *Covenant* . . 287
Hannah *v.* Willes, *Deposit in lieu of bail* 410
Hanwell *v.* Mure, *Deposit in lieu of bail* . 413
Harden *v.* Harbourn, *Deposit in lieu of bail* 411
Harding *v.* Cobley, *Driving* . . . 497
——— *v.* Hibel, *Declaration* . . 361
Harding *v.* Stokes, *Election* . . . 574
Harper *v.* Champneys, *Declaration* . 359
Harper *v.* Taswell, *Distress* . . . 454
Harris *v.* Bevan, *Covenant* . . . 318
——— *v.* Brookes, *Execution* . . 665
Harrison *v.* Almond, *Costs* . . . 239
——— *v.* Dickinson, *Deposit in lieu of bail* 412
——— *v.* Heathorn, *Demurrer* . . 394
——— *v.* Paynter, *Execution* . . 662
——— *v.* Richardson, *Demurrer* . 403
——— *v.* Ward, *Costs* . . . 258
Hartley *v.* Barlow, *Costs* . . . 259
——— *v.* King, *Covenant* . . . 309
——— *v.* Lyme Regis (Mayor of), *Corporation* 263
Hart *v.* Cutbush, *Costs* 223
——— *v.* Leach, *Distress* 415
Hartshorne *v.* Watson, *Covenant* . . 298
Harvey, Ex parte, *Corporation* . . 173
——— *v.* Archbold, *Detinue* . . . 421
——— *v.* Gilbard, *Execution* . . 667
——— *v.* King, *Demurrer* . . . 404
Harlock *v.* Ferguson, *Deceit* . . . 348
Hawkey *v.* Bowick, *Error, writ of* . . 606
Hawkins, Ex parte, *Conviction* . . 93
——— *v.* Cooper, *Driving* . . . 492
Hawks *v.* Orten, *Covenant* . . . 328
Hayselden *v.* Staff, *Contract* . . . 74
Hayter *v.* Moat, *Contract* . . . 68
———————, *Damages* . . . 340
Hayward *v.* Giffard, *Costs* . . . 232
Head *v.* Baldrey, *Contract* . . . 71
———————, *Costs* . . . 218, 247
Heath *v.* Wilson, *Driving* . . . 491
Henley *v.* Lyme Regis (Mayor of), *Error, writ of* 599
Henniker *v.* Turner, *Covenant* . . 316
Herbert *v.* Thomas, *Easement* . . . 499
Herring *v.* Dorell, *Execution* . . . 660
Heskett *v.* Biddle, *Costs* 241
Hetherington *v.* Graham, *Dower* . . 488
Hewes *v.* Pyke, *Execution* . . . 652
Hewett *v.* Pigott, *Deed* 387
———————, *Evidence* . . . 640
Hibblewhite *v.* M'Morine, *Contract* . 57
Hickinbotham *v.* Graves, *Covenant* . 297
Hickman *v.* Dallimore, *Distringas* . . 474
Higginbotham, Ex parte, *Conviction* . 94
Hill *v.* Marsden, *Deed* 382
——— *v.* Maule, *Distringas* . . . 473
——— *v.* Saunders, *Covenant* . . 322
——— *v.* Warner, *Evidence* . . . 633
Hillings *v* Young, *Damages* . . . 340
Hills *v.* Spilsbury, *Error, writ of* . . 596
Hinchliffe *v.* Jones, *Contempt* . . . 22
Hinde *v.* Gray, *Covenant* . . . 304
Hinton *v.* Stevens, *Declaration* . . 360
Hipkins *v.* Corporation of Swansea, *Corporation* 189
Hirst *v.* Horn, *Double rent and value* . 485
Hiscocks *v.* Jones, *Escape* . . . 617
Hitchcock *v.* Badham, *Distringas* . . 482
Hobson *v.* Middleton, *Covenant* . . 308
——— *v.* Wadsworth, *Declaration* . 369
Hodges *v* Lord Litchfield, *Contract* . 76
Hodgkinson *v.* Whalley, *Execution* . 657
Hodgson *v.* Towning, *Execution* . . 660
Hodson *v.* Gamble, *Costs* . . . 233
Holden *v.* Raphael, *Escape* . . . 619
Holdsworth *v.* Corporation of Dartmouth, *Corporation* . . . 203

Holford *v.* Dunnett, *Damages* . . . 339
Holland *v.* Bird. *Distress* . . . 462
——— *v.* Tealdi, *Demurrer* . . . 395
Holliday *v.* Lawes, *Costs* . . . 254
Holloway *v.* Berkeley, *Copyhold, estate of* 116
Holme *v.* Guppy, *Contract* . . . 60
Holmes *v.* Williamson, *Contribution* . . 85
Holt *v.* Miers, *Evidence* 641
Honeywood *v.* Howe, *Contract* . . 57
Hope *v.* West, *Deceit* 350
Hood *v.* Reeve, *Evidence* . . . 633
Hooker *v.* Nye, *De injuriâ* . . . 392
——— *v.* Nye, *Distress* 465
Hopcroft *v.* Keys, *Distress* . . . 442
Hopkins *v.* Corporation of Swansea, *Corporation* 196
Horncastle *v.* Moat, *Deceit* . . . 350
Horne *v.* Took, *Declaration* . . . 369
Horsford *v.* Webster, *Distress* . . . 415
Houghton *v.* Horncastle, *Distringas* . 476
Howorth *v.* Hubbersty, *Demurrer* . . 402
Hubbard *v.* Wilkinson, *Deposit in lieu of bail* 414
Hudson *v.* Revell, *Deed* 378
Hughes *v.* Brand, *Costs* 219
——— *v.* Humphreys, *Covenant* . . 322
——— *v.* Marshall, *Election* . . . 575
——— *v.* Quarters, *Driving* . . . 497
——— *v.* Rees, *Execution* . . . 666
Humphreys *v.* O'Connell, *De injuriâ* . 390
Humphrey *v.* Woodhouse, *Constable* . 18
Hunt *v.* Alewyn, *Evidence* . . . 628
——— *v.* Passmore, *Execution* . . . 663
——— *v.* Pitt, *Declaration* . . . 359
Hunter *v.* Berkeley (Countess of), *Contract* 54
Huntley *v.* Bulmer, *Costs* . . . 242
Hutchinson *v.* Bowker, *Contract* . . 46
Hurry *v.* Rickman, *Distress* . . . 446
Hyde *v.* Wombwell, *Declaration* . . 368

I.

Imason *v.* Cope, *Constable* . . . 12
Imperial Gas Co., *v.* Clarke, *Corporation* . 207
Ingram *v.* Lawson, *Demurrer* . . . 400
Inman *v.* Hill, *Costs* 260
Ireland *v.* Braham, *Covenant* . . . 309
——— *v.* Johnson, *Distress* . . . 463
Ivemy *v.* Farrant, *Contract* . . . 74

J.

Jackson *v.* Allen, *Deed* 386
——— *v.* Cawley, *Demurrer* . . . 397
——— *v.* Hill, *Escape* 617
Jacob *v.* Lee, *Evidence* 630
James *v.* Cotton, *Contract* . . . 66
——— *v.* Davis, *Costs* 248
Jeffreys *v.* Gurr, *Corporation* . . . 170
Jenkins *v.* Harvey, *Custom* . . . 335
——— *v.* Lawrence, *Escape* . . . 615
——— *v.* Peace, *Deed* 382
——— *v.* Slade, *Conveyancer* . . 89
——— *v.* Trelor, *Declaration* . . 361
Jenner *v.* Clegg, *Distress* . . . 437
Jervis *v.* Hay, *Costs* 229
Johnson *v.* Lakeman, *Execution* . . 653
Jones, In re, *Costs* 253
———, *Election* 574
Jones *v.* Bright, *Deceit* 374
——— *v.* Davies, *Costs* 263
——— *v.* De Lisle, *Error, writ of* . . 598
——— *v.* Dyer, *Distringas* . . . 479
——— *v.* Edwards, *Evidence* . . . 629
——— *v.* Evans, *Distringas* . . . 476
——— *v.* Jacob, *Costs* 244
——— *v.* Jones, *Costs* 242
——— *v.* ———, *Courts* 279
——— *v.* ———, *Distress* . . . 443
——— *v.* ———, *Dower* 490
——— *v.* Key, *Demurrer* . . . 400
——— *v.* Nanney, *Election* . . . 583
——— *v.* Owen, *Contract* . . . 69
——— *v.* Price, *Detainer* . . . 418
——— *v.* Roberts, *Demurrer* . . . 406
——— *v.* Shears, *Contract* . . . 47
——— *v.* Tye, *Execution* . . . 652
——— *v.* Waters, *Custom* . . . 333
——— *v.* Williams, *Corporation* . . 177
——— *v.* Williams, *Double rent and double value* 486
Johnson *v.* Disney, *Distringas* . . 474
——— *v.* Smallwood, *Distringas* . . 481
——— *v.* Smealey, *Distringas* . . 480
——— *v.* Wall, *Deposit in lieu of bail* . 410
Johnstone *v.* Huddlestone, *Double rent and double value* . . . 485

K.

Kasten *v.* Plaw, *Costs* 243
Kay *v.* Brookman, *Deed* . . . 385
Kearsay *v.* Pechell, *Costs* . . . 234
Keeley *v.* Austin, *Error, writ of* . . 597
Keen *v.* Smith, *Costs* 230
Kelly *v.* Brown, *Costs* 242
Kemble *v.* Farren, *Contract* . . . 53
——— *v.* Mills, *Costs* 242
Kemp *v.* Powell, *Declaration* . . . 368
——— *v.* Summer, *Distringas* . . . 469
Kemson *v.* Coatsworth, *Driving* . . 497
Kent *v.* Poole, *Costs* 244
Kenney *v.* Hutchinson, *Demurrer* . . 399
——— *v.* May, *Distress* . . . 453
King *v.* Sears, *Contract* 70
——— *v.* Skiffington, *Declaration* . . 366
Kington *v.* Hack, *De contumace capiendo* 371
Kinnear *v.* Keane, *Demurrer* . . . 402
Kirkpatrick *v.* Bank of England, *Detinue* 422
Knight *v.* Bennett, *Distress* . . 445, 449
——— *v.* Coleby, *Execution* . . 657, 663
——— *v.* Goddard, *Covenant* . . . 325
Knolls *v.* Curtis, *Distress* . . . 453
Knowles *v.* Blake, *Distress* . . . 436
——— *v.* Johnson, *Declaration* . . 361

L.

Lacey *v.* Umbers, *Demurrer* . . . 398
Ladd *v.* Thomas, *Distress* . . . 464
Lady le Fleming *v.* Sampson, *Copyhold, estate of* . . . 140
Laidler *v.* Foster, *Error, writ of* . . 595
Laird *v.* Pyne, *Contract* . . . 83
——— *v.* ———, *Damages* . . . 338
Lancaster *v.* Harrison, *Covenant* . . 302
Lander *v.* Gordon, *Execution* . . . 656

Lane *v.* Chapman, *Escape* . . . 618
—— *v.* Drinkwater, *Covenant* . . . 311
Langridge *v.* Levi, *Error, writ of* . . 666
Lang *v.* Champion, *Evidence* . . . 640
Lant *v.* Wedlake, *Contract* . . . 39
Lardner *v.* Dick, *Costs* 223
Latimer *v.* Batson, *Execution* . . . 661
Laugher *v.* Pointer, *Driving* . . . 493
Laughton *v.* Taylor, *Courts* . . . 278
Lawes *v.* Codrington, *Execution* . . 657
Layburn *v.* Crisp, *Custom* . . . 333
Layton *v.* Mason, *Declaration* . . 368
Leach *v.* Simpson, *Evidence* . . . 638
—— *v.* Thomas, *Damages* . . . 339
Leader *v.* Pryor, *Covenant* . . . 304
Ledgbird *v.* Judd, *Covenant* . . . 318
Lee, Ex parte, *Corporation* . . . 175
—— *v.* Nixon, *Contract* 64
Lees *v.* Whitcomb, *Contract* . . . 45
Legge *v.* Boyd, *Excise and customs* . . 649
—— *v.* Evans, *Execution* . . . 661
Leigh *v.* Hind, *Covenant* . . . 302
Leighton *v.* Wales, *Contract* . . . 53
Leman *v.* Leman, *Distringas* . . . 478
Levi *v.* Price, *Error, writ of* . . 596, 599
Levy *v.* Duncombe, *Contempt* . . . 22
Lewis *v.* Branthwaite, *Copyhold, estate of* 137
—— *v.* Davison, *Contract* . . . 41
—— *v.* Howell, *Costs* . . . 227
—— *v.* Morris, *Execution* . . . 657
—— *v.* Rogers, *Debtor and creditor* . 345
—— *v.* Wells, *Covenant* . . . 328
Liddel *v.* Crump, *Distringas* . . . 480
Limerick and Waterford Railway *v.* Fraser, *Costs* 235
Linden *v.* Paine, *Demurrer* . . . 398
Line *v.* Stephenson, *Covenant* . . 293
Linley *v.* Clarkson, *Contract* . . . 37
Lindsay *v.* Wells, *Declaration* . . . 368
Lindus *v.* Pound, *Demurrer* . . . 397
Liverpool (Mayor of) *v.* Tomlinson, *Covenant* 289
Lloyd *v.* Davis, *Costs* 233
—— *v.* Freshfield, *Deed* . . . 378
—— *v.* Kent, *Costs* 246
—— *v.* Roe, *Costs* 257
Lockley *v.* Pye, *Damages* . . . 338
Lockart *v.* Cooper, *Custom* . . . 336
Lockland *v.* Bodland, *Ejectment* . . 526
Lomi *v.* Tucker, *Deceit* 351
London (Chamberlain of) *v.* Compton, *Corporation* 191
Long *v.* Bilke, *Ejectment* . . . 566
Lord *v.* Cross, *Execution* . . . 650
—— *v.* Wardle, *Deed* 379
Lovatt *v.* Hamilton, *Contract* . . 49
Lovelock *v.* King, *Contract* . . . 54
Ludlow (Corporation of) *v.* Tyler, *Corporation* 171, 206, 207
Lyde *v.* Barnard, *Deceit* . . . 348
Lyme Regis (Mayor of) *v.* Henly, *Corporation* 170
Lyon *v.* Tomkins, *Distress* . . . 454
Lyons *v.* Cohen, *Demurrer* . . . 395

M.

Maberly *v.* Pitterton, *Constable* . . 18
M'Andrew *v.* Adams, *Costs* . . . 229
M'Cormack *v.* Melton, *Execution* . . 654
M'Gahey *v.* Alston, *Evidence* . . . 627
Mackie *v.* Warren, *Execution* . . . 659
Madison *v.* Bowen, *Costs* . . . 248
Magrove *v.* White, *Election* . . . 582
Maitland *v.* Mazaredo, *Error, writ of* . 597
Mallam *v.* Arden, *Distress* . . . 439
Manack *v.* Ellis, *Covenant* . . . 329
Manby *v.* Mayne, *Costs* 238
Mann *v.* Berthen, *Costs* 239
—— *v.* Owen, *Courts* 282
Mannings *v.* Lennox, *Covenant* . . 326
Mansfield (Earl of) *v.* Blackburne, *Covenant* 291
Mantz *v.* Goring, *Covenant* . . . 300
Marriott *v.* Stanley, *Costs* . . . 217
Marsh *v.* Coppock, *Election* . . . 575
Marshall *v.* Whiteside, *Covenant* . . 325
Martin *v.* Cohill, *Distringas* . . . 481
Martyr *v.* Madley, *Covenant* . . . 291
Mason *v.* Lee, *Distringas* . . . 472
—— *v.* Newland, *Distress* . . . 435
—— *v.* Polhill, *Costs* 236
—— *v.* Whitehouse, *Costs* . . . 259
Masterman *v.* Malin, *Costs* . . . 254
Masters *v.* Barnwell, *Covenant* . . 331
—— *v.* Stanley, *Execution* . . . 662
Mathias *v.* Mesnard, *Distress* . . . 446
Mattock *v.* Kinglake, *Covenant* . . 286
Maude *v.* Sessions, *Covenant* . . . 315
Maxwell *v.* Wind, *Covenant* . . . 298
Mazelstone *v.* Palmerstone (Lord), *Covenant* 310
Meager *v.* Smith, *Contract* . . . 75
Mee *v.* Tomlinson, *Declaration* . . 363
Mellish *v.* Richardson, *Error, writ of* . 604
Menar *v.* Davis, *County-rate* . . . 270
Merceron *v.* Dowson, *Covenant* . . 323
Mercers' Company (Shrewsbury) *v.* Hart, *Corporation* 197
Meredith *v.* Flaxman, *Execution* . . 654
Merry *v.* Chapman, *Escape* . . . 617
Middleton *v.* Melton, *Evidence* . . 633
Miles *v.* Dell, *Deceit* 350
Mills *v.* Barber, *Contract* . . . 83
—— *v.* Barton, *Costs* 235
—— *v.* Cody, *Ejectment* . . 556, 557
Milner *v.* Graham, *Costs* . . . 223
—— *v.* Horton, *Covenant* . . 289, 317
—— *v.* Horton, *Demurrer* . . . 404
Milton *v.* Rawlings, *Costs* . . . 247
Mitchell *v.* Johnson, *Deed* . . . 384
—— *v.* Townley, *Contract* . . . 75
Mitchenson *v.* Begbie, *Contract* . . 54
Moloney *v.* Smith, *Costs* . . . 235
Monk *v.* Moyes, *Covenant* . . . 300
Montgomery *v.* Richardson, *Evidence* . 636
Moody *v.* King, *Dower* 487
—— *v.* Morgan, *Distringas* . . . 474
Moon *v.* Raphael, *Evidence* . . . 642
Moore *v.* Archer, *Declaration* . . . 360
Moreton *v.* Harden, *Driving* . . . 495
Morgan *v.* Birnie, *Contract* . . . 58
—— *v.* Brown, *Conviction* . . . 96
—— *v.* Miller, *Costs* 252
—— *v.* Morgan, *Deed* 385
—— *v.* Pedler, *Deposit in lieu of bail* . 408
—— *v.* Thorn, *Costs* 215
—— *v.* Thynne, *Distringas* . . . 475
Morris *v.* Gardner, *Ecclesiastical persons* 501

Morris *v.* Smith, *Declaration* . . . 355
——— *v.* Thompson, *Covenant* . . 329
Morrison *v.* Harmer, *Costs* . . . 228
Mortimer *v.* Piggott, *Execution* . . 653
Morton *v.* Burn, *Contract* . . . 42
——— *v.* Burn, *Execution* . . . 656
——— *v.* Grey, *Declaration* . . . 356
Mullins *v.* Cox, *Demurrer* . . . 399
Munn *v.* Godbold, *Deed* . . . 381
Munty *v.* Sturge, *Election* . . . 577
Murray *v.* Heath, *Copyright* . . . 142
Muston *v.* Hall, *Error, writ of* . . 597

N.

Nanney *v.* Kenrick, *Demurrer* . . 401
National Bank of St. Charles *v.* De Bernales, *Evidence* 645
Naylor *v.* Joseph, *Costs* 235
Neale *v.* Mackenzie, *Distress* . . . 439
Neck *v.* Humphrey, *Escape* . . . 619
Neeley *v.* Lock, *Contract* . . . 77
Nelson *v.* Whittall, *Deed* . . . 385
Nesbit *v.* Rishton, *Error, writ of* . . 593
Nettleton's case, *Embezzlement* . . 584
Newcastle (Duke of) *v.* Broxtowe, *Evidence* . . 632
Newell *v.* Rooke, *Error, writ of* . . 608
Newhall *v.* Holt, *Evidence* . . . 634
Newnham *v.* Harvey, *Declaration* . . 366
Newham *v.* Taite, *Contract* . . . 82
Newman *v.* Bendythe, *Conviction* . . 94
——— *v.* Hodgson, *Deposit in lieu of bail* 410
——— *v.* Hickman, *Distringas* . . 473
Newton *v.* Allen, *Covenant* . . . 294
——— *v.* Cowie, *Copyright* . . . 142
——— *v.* Howland, *Costs* . . . 255
——— *v.* Harland, *Damages* . . 339
Nickling *v.* Dickens, *Declaration* . . 359
Nixon *v.* Nanney, *Conviction* . . 93
Nock *v.* Southall, *Declaration* . 366, 369
Noel *v.* Davis, *Contract* . . . 75
—— *v.* Rich, *De injuriâ* . . . 390
Nokes *v.* Frazer, *Costs* 217
Norman *v.* Wescombe, *Distress* . . 465
——— *v.* White, *Distringas* . . . 476
Norton *v.* Mackintosh, *Demurrer* . . 402
Notts *v.* Curtis, *Distress* . . . 456
Nowell *v.* Rooke, *Error, writ of* . . 898
Nugent (Lord) *v.* Harcourt, *Costs* . . 235
Nunn, In re, *Conviction* . . . 95
Nuttall *v.* Staunton, *Distress* . . . 448

O.

Oldfield *v.* Lowe, *Contract* . . . 55
Overton *v.* Swettenham, *Courts* . . 280
Owen *v.* Bowes, *Deed* 377
—— *v.* Owen, *Execution* . . . 660
Oxenden *v.* Cropper, *Costs* . . . 233
——— *v.* Palmer, *Ejectment* . . 559

P.

Page *v.* Hemp, *Distringas* . . . 480
—— *v.* Mann, *Deed* 385
Paget *v.* Foley, *Covenant* . . . 326
Pain, Ex parte, *Conviction* . . 92, 93
Paine *v.* Emery, *Covenant* . . . 321
Palmer *v.* Powel, *Corporation* . . 198
——— *v.* Temple, *Contract* . . . 52
Parker *v.* Gossage, *Contract* . . . 48
——— *v.* Newton, *Courts* . . . 279
——— *v.* Ramsbottom, *Deed* . . . 384
——— *v.* Riley, *De injuriâ* . . 391, 392
——— *v.* Serle, *Costs* 251
Parkins *v.* Cobbet, *Evidence* . . . 628
Parsons *v.* Pitcher, *Costs* . . . 253
Parrett Navigation Company *v.* Stower, *Demurrer* 396
Parry *v.* Duncan, *Distress* . . . 456
Partridge *v.* Walbank, *Distringas* . . 475
Paton *v.* Duncan, *Contract* . . . 58
Paul *v.* Nurse, *Covenant* . . . 326
Peacock *v.* Day, *Execution* . . . 654
Pearce *v.* Morris, *Covenant* . . . 327
——— *v.* Swan, *Distringas* . . . 478
Pearcy *v.* Walter, *Driving* . . . 495
Pearse *v.* Morrice, *Deed* . . . 381
Pearson *v.* Skelton, *Contribution* . . 86
——— *v.* Wheeler, *Deceit* . . . 351
Pearsons *v.* Yewens, *Detainer* . . . 419
Pedler *v.* Page, *Deed* 385
Pegg *v.* Stead, *Contract* 74
Pennell *v.* Kingston, *Distringas* . . 470
Percival *v.* Alcock, *Execution* . . . 655
Percy *v.* Turner, *Costs* 226
Perd *v.* Higginson, *Costs* . . . 223
Perring *v.* Tucker, *Evidence* . . . 634
Pheney *v.* Jones, *Escape* . . . 620
Phillips *v.* Berkeley, *Ecclesiastical persons* 504
——— *v.* Berkeley, *Execution* . . 666
——— *v.* Hayward, *Detinue* . . . 424
——— *v.* Hutcheson, *Costs* . . . 261
——— *v.* Robinson, *Detinue* . . . 423
——— *v.* Wimburn, *Evidence* . . 638
Philpotts *v.* Evans, *Contract* . . . 83
Phypen *v.* Elwin, *Copyhold, estate of* . 133
Pickles *v.* Hollings, *Driving* . . . 497
Piggott *v.* Birtles, *Distress* . . . 458
Pilcher *v.* Woods, *Contempt* . . . 22
Pilgani *v.* Lawson, *Costs* . . . 241
Pilmore *v.* Hodd, *Contract* . . . 61
——— *v.* Hood, *Deceit* 349
Pine *v.* Philcox, *Costs* 258
—— *v.* Woodman, *Demurrer* . . . 395
Pitman *v.* Humphrey, *Costs* . . . 255
Pitt *v.* Coombs, *Deposit in lieu of bail* . 411
—— *v.* Wilks, *Declaration* . . . 358
—— *v.* Williams, *Covenant* . . . 319
—— *v.* Williams, *Error, writ of* . . 598
Planché *v.* Braham, *Copyright* . . 144
——— *v.* Colburn, *Contract* . . . 56
Platt *v.* Greene, *Costs* 252
Platts *v.* Lean, *Contract* . . . 65
Plaxton *v.* Dare, *Distress* . . . 437
Plomer *v.* Ball, *Execution* . . . 659
Pluckwell *v.* Wilson, *Driving* . . . 491
Plummer *v.* Lee, *Costs* 230
——— *v.* Woodburne, *Estoppel* . . 624
Poensgen *v.* Chanter, *Discontinuance* . 430
Poole *v.* Warren, *Deed* 386
—— *v.* Warren, *Double rent and double value* . . . 485
—— *v.* Watkins, *Costs* 258
Pope *v.* Mann, *Declaration* . . . 367
Porter *v.* Cooper, *Contract* . . . 39

Portman *v.* Harrell, *Distress* . . 456, 464
Portmore (Lord) *v.* Goring, *Deed* . . 383
Poucher *v.* Norman, *Conveyance* . . 89
Poulet *v.* Basingstoke Canal Company, *Covenant* 288
Poulterers' Company *v.* Phillips, *Corporation* . . 196
Powell *v.* Duncan, *Crim. con.* . . 331
——— *v.* Horten, *Contract* . . . 47
——— *v.* Sonnett, *Error, writ of* . . 592
Power *v.* Butcher, *Discontinuance* . . 432
——— *v.* Fry, *Counsel's signature* . . 265
Preece *v.* Corne, *Distress* . . . 441
Prescott *v.* Boucher, *Distress* . . . 443
Preston *v.* Carr, *Deed* 387
Price *v.* Bower, *Distringas* . . . 472
——— *v.* Easton, *Contract* . . 40, 68
——— *v.* Varney, *Execution* . . . 665
Primrose *v.* Bradley, *Costs* . . . 252
Pringle *v.* Isaac, *Execution* . . . 662
Pritchet *v.* Boevey, *Damages* . . . 339
Probart *v.* Phillips, *Costs* . . . 216
Proudlove *v.* Twemlow, *Distress* . . 437
Pugh *v.* Kerr, *Costs* 224
Pybus *v.* Bryant, *Distringas* . . . 482

R.

Radford *v.* Smith, *Contract* . . . 66
Rand *v.* Vaughan, *Distress* . . . 456
Randal *v.* Everest, *Contract* . . . 83
Rawlins *v.* Desborough, *Evidence* . . 642
Rawson *v.* Moss, *Distringas* . . . 476
Ray *v.* Sharp, *Costs* 225
Raymond *v.* Filch, *Covenant* . . . 313
Reader *v.* Bloom, *Costs* 215
Reading *v.* Menham, *Contract* . . 48
Reay *v.* Richardson, *Evidence* . . 633
Redit *v.* Lucock, *Costs* 225
Reed *v.* Spurr, *Counsel's signature* . . 264
Rees *v.* Bowen, *Ejectment* . . . 555
——— *v.* Lines, *Contract* 56
——— *v.* Rees, *Execution* . . . 652
——— *v.* Thornton, *Ejectment* . . . 539
Reeve *v.* Underhill, *Covenant* . . 324, 328
Reg. Gen., H. T. 1833, *Declaration* . 362
——— H. T. 1828, *Demurrer*, 402, 403, 404
——— H. T. 1831, *Demurrer* . . 403
——— T. T. 1833, K. B., *Detainer* . 420
——— E. T. 1821, *Ejectment* . . 546
——— H. T. 1 & 2 Geo. 4, *Ejectment* 552
——— 1 Will. 4, *Ejectment* . . 525
——— H. T. 1838, *Ejectment* . . 547
——— T. T. 1838, *Ejectment* . . 554
——— T. T. 1840, *Ejectment* . . 554
——— T. T. 1832, *Error, writ of* . 610
——— H. T. 1833, *Error, writ of*, 601, 602, 605
——— H. T. 1833, *Evidence* . . 635
Reg. *v.* Bishop's Stoke (Lord of Manor of), *Copyhold, estate of* . . . 131
——— *v.* Mayor of Bridgewater, *Corporation* 208
——— *v.* Brightwell, *Corporation* . . 186
——— *v.* Brownlow, *Coroner* . . . 155
——— *v.* Carmarthen (Mayor of), *Corporation* 173
——— *v.* Carmarthen (Recorder of), *Corporation* 202
——— *v.* Cheshire (Justices of), *Conviction* 98
Reg. *v.* Dodsworth, *Election* . . . 574
——— *v.* Evesham (Mayor of), *Corporation* 188
——— *v.* Hall, *Copyhold, estate of* . . 130
——— *v.* Humphrey, *Corporation* . . 187
——— *v.* Jameson, *Costs* 258
——— *v.* Johnson, *County gaol* . . 267
——— *v.* ———, *Embezzlement* . . 587
——— *v.* Jones, *County treasurer* . . 275
——— *v.* ———, *De contumace capiendo* . 371
——— *v.* Ledgard, *Corporation* . . . 187
——— *v.* Leeds (Borough of) *Corporation* . 187
——— *v.* Leeds (Mayor of), *Corporation* . 186
——— *v.* Liverpool (Corporation), *Constable* 171
——— *v.* Lovell, *Embezzlement* . . . 586
——— *v.* Mattey, *Costs* 258
——— *v.* Norwich (Corporation), *Corporation* 175
——— *v.* Parry, *Corporation* . . . 199
——— *v.* Pepper, *Election* . . . 574
——— *v.* Pitt, *Copyhold, estate of* . . 122
——— *v.* Poole (Mayor of), *Corporation* . 173
——— *v.* Radnor (Justices of), *Distress* . 457
——— *v.* Ricketts, *De Contumace capiendo* 371
——— *v.* ———, *Corporation* . . . 187
——— *v.* Stockdale, *Coroner* . . . 154
——— *v.* Swansea (Mayor of), *Corporation* 176
——— *v.* Thorogood, *De contumace capiendo* 370
——— *v.* Treasury (Lords of), *Corporation* 174, 175
——— *v.* Vincent, *Constable* . . . 7
——— *v.* Warwick (Corporation of), *Corporation* 176
——— *v.* Watkinson, *Constable* . . 2
——— *v.* Wilson, *Embezzlement* . . 585
——— *v.* York (Mayor of), *Corporation* . 174
Regnant *v.* Porter, *Distress* . . . 441
Reid *v.* Batte, *Contract* 81
——— *v* Coleman, *Contract* . . . 38
Randle *v.* Levy, *Covenant* . . . 293
Read *v.* Deere, *Contract* . . . 37
Reynolds *v.* Blackburn, *De injuriâ* . . 392
——— *v.* Newton, *Execution* . . 659
Rex, In re, *Conviction* 94
——— *v.* Ackland, *Constable* . . . 5
——— *v.* Arnold, *Corporation* . . 186
——— *v.* Attwood, *Corporation* . . 182
——— *v.* Beacall, *Embezzlement* . . 387
——— *v.* Beaufort (Duke of), *Corporation* . 182
——— *v.* Bennett, *Coroner* . . . 154
——— *v.* Bentley, *Evidence* . . . 638
——— *v.* Berwick (Justices of), *County-rate* 268
——— *v.* Birmingham and Gloucester Railway, *Corporation* . . . 189
——— *v.* Blackwater (Inhabs. of), *County-rate* 274
——— *v.* Bonner, *Dying declaration* . 498
——— *v.* Brain, *Constable* . . . 3, 6
——— *v.* Bridgenorth (Mayor of), *Corporation* 201
——— *v.* Bridgewater (Mayor of), *Corporation* . . . 171, 175
——— *v.* Bridgewater and Taunton Canal Company, *Constable* . . 12
——— *v.* Bryant, *Ejectment* . . . 563
——— *v.* Bucks (Justices of), *County-rate* 272
——— *v.* Bumstead, *Corporation* . . 181
——— *v.* Callahan, *Embezzlement* . . 587
——— *v.* Cambridge (Corporation of), *Corporation* 174
——— *v.* Carlisle, *Error, writ of* . . 601
——— *v.* Clarke, *Constable* . . . 10

Rex *v.* Crickett, *Dying declaration* . 498
—— *v.* Dale, *Excise and Customs* . . 648
—— *v.* Davis, *Distress* 457
—— *v.* Davis, *Ecclesiastical persons* . 501
—— *v.* Day, *Costs* 243
—— *v.* De Beauvoir, *Election* . . 583
—— *v.* Devett, *Coroner* . . . 154
—— *v.* Dignam, *Costs* 261
—— *v.* Doncaster (Mayor of), *Corporation* 177
—— *v.* Dullingham (Lady of the Manor of), *Copyhold, estate of* . . . 133
—— *v.* Evett, *Coroner* 154
—— *v.* Fagent, *Dying declaration* . 498
—— *v.* Farleigh (Earl of), *Evidence* . 628
—— *v.* Farrant, *Coroner* . . . 157
—— *v.* Fell, *Cotton factories* . . . 263
—— *v.* Francis, *Evidence* . . . 638
—— *v.* Gay, *Dying declaration* . . 498
—— *v.* Goldsmith, *Corporation* . . 181
—— *v.* Goodbody, *Embezzlement* . . 585
—— *v.* Grand Junction Railway, *Coroner* 152
—— *v.* Grant, *Corporation* . . . 177
—— *v.* Greene, *Corporation* . . . 171
—— *v.* Grove, *Enrolments* . . . 588
—— *v.* Guest, *Corporation* . . . 183
—— *v.* Hall, *Conviction* . . . 93
—— *v.* Hall, *Embezzlement* . . . 587
—— *v.* Hanson, *Conviction* . . . 97
—— *v.* Harris, *Corporation* . . . 178
—— *v.* Harris, *Election* 583
—— *v.* Hawlers, *Embezzlement* . . 585
—— *v.* Hawthorne, *Corporation* . . 169
—— *v.* Hayward, *County-rate* . . 272
—— *v.* Headley, *Corporation* . . . 183
—— *v.* Herefordshire (Sheriff of), *Courts* 279
—— *v.* Hewitt, *De contumace capiendo* . 371
—— *v.* Hexham, *Copyhold, estate of* . 125
—— *v.* Higgins, *Costs* 263
—— *v.* Howes, *Error, writ of* . . 633
—— *v.* Hughes, *Corporation* . . 168, 184
—— *v.* Hughes, *Embezzlement* . . 585
—— *v.* Langhorn, *Corporation* . . 197
—— *v.* Leicester (Justices of), *Corporation* 14
—— *v.* Lloyd Jones, *Embezzlement* . 587
—— *v.* London (Mayor, &c., of), *Corporation* 185
—— *v.* Longnor, *Deed* 377
—— *v.* May, *Corporation* . . . 183
—— *v.* Merchant Tailors' Company, *Corporation* 191
—— *v.* Mildmay, *Copyhold, estate of* . 128
—— *v.* Mitchell, *Coroner* . . . 154
—— *v.* Morley, *Contempt* . . . 24
—— *v.* Mosley, *Dying declaration* . . 498
—— *v.* Murray, *Embezzlement* . 583, 586
—— *v.* Newcastle (Justices of), *Conviction* 97
—— *v.* Nicholas, *Coroner* . . . 154
—— *v.* North, *Conviction* . . . 92
—— *v.* Oswald, *Constable* . . . 5
—— *v.* Oundle (Lord of the Manor of), *Copyhold, estate of* . . . 124
—— *v.* Packwood, *Costs* . . . 259
—— *v.* Payne, *Conviction* . . . 93
—— *v.* Piddlehinton, *Evidence* . . 629
—— *v.* Polfield, *Coroner* . . . 154
—— *v.* Pool (Recorder of), *Corporation* . 201
—— *v.* Poulton, *Covenant* . . . 314
—— *v.* Pulsford, *Corporation* . . . 180
Rex *v.* Quinch, *Coroner* . . . 154
—— *v.* Rabbits, *Distress* . . . 457
—— *v.* Richardson, *Conviction* . . 98
—— *v.* Rickets, *De contumace capiendo* . 371
—— *v.* Roberts, *Constable* . . . 7
—— *v.* Roberts, *Corporation* . . . 184
—— *v.* Rochester (Dean of), *Ecclesiastical persons* 502
—— *v.* Rolfe, *Corporation* . . . 185
—— *v.* Salway, *Corporation* . . . 180
—— *v.* Sawyer, *Corporation* . . . 179
—— *v.* Scaife, *Dying declaration* . . 498
—— *v.* Shepherd, *County-rate* . . 269
—— *v.* Smith, *Constable* . . . 9
—— *v.* Southwood, *Copyhold, estate of* . 135
—— *v.* Spilsbury, *Dying declaration* . 498
—— *v* Spraggs, *Costs* 262
—— *v.* Stafford (Justices of), *County-rate* 274
—— *v.* Steptoe, *Evidence* . . . 637
—— *v.* Sullers, *Embezzlement* . . 586
—— *v.* Taylor, *Conviction* . . . 91
—— *v.* Taylor, *Coroner* . . . 153
—— *v.* Thorley, *Embezzlement* . . 585
—— *v.* Thruscross, *Copyhold, estate of* . 139
—— *v.* Tizzard, *Corporation* . . . 176
—— *v.* Townrow, *Corn returns* . . 147
—— *v.* Truro (Mayor of), *Corporation* . 190
—— *v.* Walsh, *Conviction* . . . 98
—— *v.* Warwick (Justices of), *Coroner* . 157
—— *v.* Warwickshire (Justices of), *Conviction* 97
—— *v.* Wells (Mayor of), *Courts* . . 276
—— *v.* Westmoreland (Justices of), *County-rate* 273
—— *v.* Westwood, *Corporation* . 168, 182
—— *v.* White, *Embezzlement* . 585, 586
—— *v.* Wickham, *Evidence* . . . 633
—— *v.* Williams, *Embezzlement* . 585, 588
—— *v.* Wilson, *Conviction* . . . 92
—— *v.* Winchester (Mayor of), *Corporation* 186
—— *v.* Wright, *Error, writ of* . . 612
—— *v.* York (Sheriff of), *Corporation* . 194
—— *v.* York (Justices of), *Costs* . . 231
Rich *v.* Woolley, *Distress* . . . 459
Richards *v.* Frankum, *Evidence* . . 642
Richardson *v.* Frankum, *Detinue* . 423, 424
—— *v.* Mellish, *Contract* . . 43
—— *v.* Mellish, *Error, writ of* . 600
Riches *v.* Evans, *Execution* . . . 653
Ricketts *v.* Lewis, *Error, writ of* 595, 605, 609
Rigby *v.* Jeffrys, *Evidence* . . . 628
Right *d.* Jeffrey *v.* Wrong, *Ejectment* . 547
Ringer *v.* Cann, *Debtor and creditor* . 345
Ripling *v.* Watts, *Declaration* . . . 358
Roberts *v.* Hayward, *Distress* . . . 448
—— *v.* Lemon, *Costs* 224
Robinson *v.* Day, *Error, writ of* . . 596
—— *v.* Evrington, *Declaration* . 369
—— *v.* Hofman, *Distress* . . 444
—— *v.* Messenger, *Costs* . . . 218
—— *v.* Robinson, *Costs* . . . 226
—— *v.* Yewens, *Detainer* . . 419
Rodwell *v.* Redge, *Evidence* . . . 632
Roe *v.* Cobham, *Costs* 247
—— *v.* Roe, *Ejectment* 529
Rogers *v.* Ball, *Error, writ of* . . . 600
—— *v.* Banger, *Costs* 234
—— *v.* Custance, *Evidence* . . . 639

Rogers *v.* Humphrys, *Distress* . . 443
——— *v.* Jones, *Conviction* . . . 96
——— *v.* Wood, *Evidence* . . . 641
Rolfe *v.* Brown, *Declaration* . . . 368
Rollan *v.* Jeffery, *Declaration* . . 360
Ronson *v.* Dundas, *Election* . 580, 581, 582
Rooke *v.* Sherwood, *Declaration* . . 368
Roper *v.* Phillips, *Costs* 237
Rose *v.* Fenn, *Costs* 258
——— *v.* Lane, *Constable* 6
——— *v.* Tomblinson, *Execution* . . 659
Ross *v.* Robeson, *Demurrer* . . . 397
Routlege *v.* Grant, *Contract* . . 56, 78
Rowe *v.* Brenton, *Cornwall, duchy of* . 148
——— *v.* Brenton, *Evidence* . 632, 641, 644
——— *v.* Softly, *Deposit in lieu of bail* . 408
Roy *v.* Bristowe, *Declaration* . . . 364
Ruddick *v.* Simmons, *Execution* . . 656
Rush *v.* Peacock, *Evidence* . . . 630
Russell *v.* Rider, *Distress* . . . 450
Ruston *v.* Crosby, *Error, writ of* . . 592
Ryan *v.* Furnell, *Costs* 262

S.

Sadler *v.* Hickson, *Contribution* . . 86
Sainsbury *v.* Thorp, *Distringas* . . 475
St. Charles (National Bank of) *v.* De Bernales, *Corporation* . 203
——— *v.* De Bernales, *Costs* . . 209
Salter *v.* Pomford, *Counsel's signature* . 266
——— *v.* Slade, *Error, writ of* . . 604
Sampson *v.* Easterby, *Covenant* . . 284
——— *v.* Graves (Lord), *Distringas* . 477
Sams *v.* Culham, *Declaration* . . . 367
Sandall *v.* Bennett, *Demurrer* . . 403
Sandys *v.* Hohler, *Costs* 236
Saunders *v.* De Chartelin, *Distringas* . 480
——— *v.* Musgrave, *Execution* . . 663
Saunderson *v.* Bourne, *Distringas* . . 477
Savage *v.* Lipscombe, *Costs* . . . 250
Savoury *v.* Chapman, *Escape* . . . 617
Scarborough *v.* Evans, *Distringas* . . 477
Scherwinski *v.* Peronnet, *Deposit in lieu of bail* 414
Schlenker *v.* Moxey, *Deed* . . . 388
Scott, In re, *Election* 581
——— *v.* Henley, *Escape* . . . 620
——— *v.* Ritson, *Demurrer* . . . 404
Sealey v. Harris, *Distress* . . . 464
Seaman *v.* Price, *Contract* . . . 40
Selway *v.* Fogg, *Contract* . . . 60
Selwood *v.* Mount, *Conviction* . . 99
Semple *v.* Turner, *Error, writ of* . . 597
Serjeants-at-law, Ex parte, *Counsel's signature* 265
Servante *v.* James, *Covenant* . . . 310
Sharpe *v.* Lamb, *Evidence* . . . 635
Shaw *v.* Pope, *Corporation* . . . 194
Sheddy *v.* Saunders, *Contract* . . 52
Sheldon *v.* Whittaker, *Execution* . . 663
Shepherd *v.* Cafe, *Distress* . . . 446
——— *v.* Gosden, *Declaration* . . 361
Sheppard *v.* Hale, *Custom* . . . 335
Sherman *v.* Barnes, *Driving* . . . 497
Shillibeer *v.* Glyn, *Contract* . . . 42
Shirley, Ex parte, *Copyhold, estate of* . 114
Short *v.* Hubbard, *Distress* . . . 437
Short *v.* Kalloway, *Covenant* . . . 314
Shutt *v.* Smith, *Contract* . . . 51
Sills *v.* Brown, *Coroner* 153
Silverside *v.* Tappen, *Declaration* . . 362
Simmons *v.* Swift, *Contract* . . . 51
Simons *v.* Farren, *Covenant* . . 304, 321
Simpson *v.* Clayton, *Covenant* . . 297
——— *v.* Heath, *Execution* . . . 653
Sinclair *v.* Stevenson, *Contract* . . 78
——— *v.* Stevenson, *Evidence* . 628, 633
Singleton *v.* Barrett, *Evidence* . . 634
Skaife *v.* Jackson, *Estoppel* . . . 624
Skeate *v.* Beale, *Distress* . . . 461
Skidmore *v.* Booth, *Distress* . . . 452
Skinner and Another *v.* Stocks, *Contract* 64
Slatter *v.* Slatter, *Dower* 489
Slattery *v.* Pooley, *Evidence* . . . 634
Smith, Ex parte, *Conviction* . . . 92
——— *v.* Bail, *Error, writ of* . . . 600
——— *v.* Birmingham Gas Company, *Corporation* 191
——— *v.* Blandy, *Contract* . . . 46
——— *v.* Blandy, *Evidence* . . . 644
——— *v.* Campbell, *Costs* . . . 216
——— *v.* Clarke, *Declaration* . . 367
——— *v.* Dawes, *Contract* . . . 82
——— *v.* Day, *Distress* 440
——— *v.* Dixon, *Distress* . . . 463
——— *v.* Good, *Distringas* . . 473, 474
——— *v.* Goodam, *Distress* . . 451, 461
——— *v.* Hill, *Distringas* . . . 478
——— *v.* Jennings, *Deed* . . . 383
——— *v.* Johnson, *Execution* . . . 657
——— *v.* Laurence, *Driving* . . . 493
——— *v.* Morgan, *Evidence* . . . 637
——— *v.* Packlington, *Covenant* . . 287
——— *v.* Rolt, *Contract* 57
——— *v.* Wilson, *Covenant* . . . 306
——— *v.* Wilson, *Evidence* . . . 633
Snell *v.* Snell, *Covenant* 323
——— *v.* Snell, *Deed* 383
Snook *v.* Martocks, *Error, writ of* . . 591
——— *v.* Southwood, *Copyhold, estate of* . 122
Solley *v.* Neish, *De injuriâ* . . . 390
Solomonson *v.* Parker, *Declaration* . . 362
Soulby *v.* Pickford, *Contract* . . . 80
Southwell *v.* Bird, *Costs* 217
Soward *v.* Ansley, *Covenant* . . . 316
——— *v.* Leggatt, *Covenant* . . . 328
Sowell *v.* Champion, *Execution* . . 663
Sowter *v.* Hitchcock, *Covenant* . . 321
Spence *v.* Barker, *Distringas* . . . 478
Spicer *v.* Cooper, *Contract* . . . 80
Spivy *v.* Webster, *Costs* 260
Spragg *v.* Willis, *Costs* 262
Stacy *v.* Evans, *Costs* 263
Stafford (Mayor of) *v.* Till, *Corporation* . 206
Stanforth *v.* M'Cann, *Descent* . . 415
Stanhope *v.* Eavory, *Execution* . . 651
Stanley *v.* Towgood, *Covenant* . . 300
Stannard *v.* Forbes, *Covenant* . . 294
Startup *v.* Cortazzi, *Contract* . . 76
——— *v.* Cortazzi, *Damages* . . 338
Stavers *v.* Curling, *Covenant* . . . 285
Steers *v.* Carwardine, *Covenant* . . 499
Steinkeller *v.* Newton, *Contract* . . 82
Stephen *v.* Gwennap, *Evidence* . . 628
——— *v.* Ufford, *Contract* . . . 76
——— *v.* Webb, *Contract* . . 41, 55, 77

Stockdale *v.* Hansard, *Contempt* . . 23
Stocken *v.* Carter, *Constable* . . . 9
Storr *v.* Mount, *Detainer* . . . 418
—— *v.* Scott, *Debtor and creditor* . . 345
Story *v.* Houlditch, *Costs* . . . 228
Stracy *v.* Blake, *Evidence* . . . 636
Straford *v.* Love, *Deposit in lieu of bail* . 409
Strange *v.* Freeman, *Distringas* . . 479
Strother *v.* Hutchinson, *Courts* . . 281
Stultz *v.* Heneage, *Deposit in lieu of bail* 414
Stunnell *v.* Fower, *Costs* . . . 259, 262
Sturge *v.* Buchanan, *Evidence* . 630, 612
Styles *v.* Wardle, *Deed* 383
Sullivan *v.* Bishop, *Double rent and double value* 485
Sutcliffe *v.* Eldred, *Error, writ of* . . 599
Swann *v.* Falmouth (Earl of) . . 450
Swan *v.* Phillips, *Deceit* 348
Sweet *v.* Archbold, *Copyright* . . 143
Sweeting *v.* Asplin, *Contract* . . . 66
Swift *v.* Wright, *Distringas* . . . 481
Syson *v.* Johnson, *Drainage* . . . 470

T.

Talbot *v.* Binns, *Courts—of county court* 279
Tarling *v.* Baxter, *Contract* . . . 50
Tarr *v.* M'Gahey, *Election* . . . 582
Taverner *v.* Little, *Driving* . . . 496
Taylor *v.* Briggs, *Contract* . . . 48
——— *v.* Cohen, *Contribution* . . . 87
——— *v.* Cohen, *Evidence* . . . 632
——— *v.* Devey, *Custom* . . . 364
——— *v.* Henniker, *Distress* . . . 465
——— *v.* Lanyon, *Execution* . . . 663
——— *v.* Murray, *Demurrer* . . . 406
——— *v.* Thompson, *Costs* . . . 231
Taylorson *v.* Peterson, *Distress* . . 419
Temperley *v.* Scott, *Costs* . . . 228
Tenant *v.* Brown, *Costs* 236
Tenne *v.* Cutt, *Ejectment* . . . 830
Tenny *d.* Gibbs *v.* Moody, *Ejectment* . 545
Thomas *v.* Edward, *Election* . . . 577
——— *v.* Elder, *Distringas* . . . 470
——— *v.* Harries, *Distringas* . . 450
——— *v.* Harries, *Election* . . . 577
——— *v.* Jackson, *Declaration* . . 365
——— *v.* Lewis, *Costs* 221
Thompson *v.* Dicas, *Declaration* . . 360
Thornton *v.* Jennings, *Corporation* . . 206
——— *v.* Whitehead, *Declaration* . 363
Thorpe *v.* Worthy, *Costs* 246
Thrustout *v.* Shenton, *Ejectment* . 562, 563
Tidmos *v.* Lees, *Evidence* . . . 641
Tinn *v.* Billingsley, *Costs* . . . 227
—— *v.* Billingsley, *Evidence* . . . 631
Tipper *v.* Bicknell, *Contract* . . . 43
Tobacco Pipe Makers' Company *v.* Woodrooffe, *Corporation* . 169
Todd *v.* Fellingham, *Costs* . . . 249
Tod *v.* Tod, *Costs* 209, 232
—— *v.* Earl of Winchelsea, *Evidence* . 644
Tomkins *v.* Achly, *Evidence* . . . 640
Tomlins *v.* Lawrence, *Erasure* . . 589
Tomlinson *v.* Nanny, *Declaration* . . 365
Tone (Conservators of the River) *v.* Ash, *Corporation* 168
Toosey *v.* Williams, *Evidence* . . . 643
Townsend *v.* Gurney, *Declaration* . . 359
Truslove *v.* Burton, *Costs* . . . 224
——— *v.* Burton, *Evidence* . . 636
Tucker *v.* Brand, *Distringas* . . . 480
Tufnel *v.* Constable (Executors, &c.) *Covenant* 307
Turley *v.* Thomas, *Driving* . . . 492
Turner *v.* Denman, *Declaration* . . 361
——— *v.* Smith, *Distringas* . . . 469
Tyndal *v.* Ulleshame, *Demurrer* . . 398
Tyson *v.* Billingsley, *Costs* . . . 226
—— *v.* Smith, *Customs* . . . 333

U.

Underhill *v.* Harvey, *Demurrer* . . 402
Undershell *v.* Fuller, *Demurrer* . . 401
Unite *v.* Humphrey, *Declaration* . . 356

V.

Vacher *v.* Cocks, *Deed* 386
Varley *v.* Manton, *Contract* . . . 69
Vaux *v.* Vallons, *Ecclesiastical persons* . 501
Veal *v.* Nicholls, *Contract* . . . 36
Verbecke *v.* Pearse, *Demurrer* . . 397
Vere *v.* Gonar, *Distringas* . . . 478
Verulam (Lord) *v.* Howard, *Copyhold, estate of* 138
Vice *v.* Anson, *Evidence* . . . 630
Vickers *v.* Cock, *Contract* . . . 60
Vines *v.* Reading, *Corporation, Exceptions, bill of* 646
Virtue *v.* Beasley, *Distress* . . . 451
Vyse *v.* Wakefield, *Covenant* . . . 319

W.

Wackerbath *v.* Rich, *Excise and customs* 648
Waddington *v.* Palmer, *Distringas* . . 472
Wadsworth *v.* Gibson, *Error, writ of* . 598
Wainwright *v.* Bland, *Costs* . . . 244
——— *v.* Johnson, *Demurrer* . 405
Waite *v.* Spingin, *Costs* 221
Walker *v.* Beauchamp, *Evidence* . . 640
——— *v.* Jones, *Detinue* . . . 422
——— *v.* Lane, *Costs* 225
——— *v.* Rawson, *Contract* . . . 76
Walkinshaw *v.* Marshall, *Costs* . . 237
Waller *v.* Smith, *Costs* 251
Wallis *v.* Day, *Covenant* . . . 305
Walsh *v.* Fussell, *Covenant* . . . 287
Ward *v.* Graystock, *Declaration* . . 365
—— *v.* Gregg, *Costs* 249
—— *v.* Nanney, *Election* . . . 576
—— *v.* Pearson, *Contract* . . . 73
—— *v.* Trimmer, *Covenant* . . . 316
—— *v.* Shea, *Distress* 439
Warren *v.* Love, *Distringas* . . . 479
Waters *v.* Weatherby, *Costs* . . . 221
Watkins *v.* Morgan, *Covenant* . . 229
Watson *v.* Carroll, *Detainer* . . . 419
——— *v.* Delcroix, *Distringas* . . 483
——— *v.* Horne, *Covenant* . . . 296
——— *v.* Lock, *Distringas* . . . 470
——— *v.* Mairs, *Distress* . . . 456
——— *v.* Maskill, *Execution* . . . 654

Waugh *v.* Pry, *Distringas* . . . 480
Weatherly *v.* Greig, *Covenant* . . . 315
Week *d.* Burge *v.* Calloway, *Ejectment* . 566
Webb *v.* Baker, *Demurrer* . . . 405
——— *v.* Smith, *Election* . . . 583
Webber *v.* Nicholas, *Costs* . . . 256
Weddle *v.* Brazier, *Declaration* . . 354
Wedgewood *v.* Hartley, *Distress* . . 466
Weeton *v.* Woodcock, *Declaration* . 363, 364
Wells *v.* Moody, *Distress* . . . 458
Welsh *v.* Rose, *Distress* 464
Wendover *v.* Cooper, *Declaration* . . 354
Wenham *v.* Fowle, *Costs* . . . 256
——————— *v.* Fowle, *Debtor and creditor* . 346
——————— *v.* Fowle, *Deed* . . . 381
Wentworth *v.* Cock, *Contract* . . . 40
West *v.* Turner, *Ecclesiastical court* . . 500
Whalley *v.* Williamson, *Costs* . . . 219
——————— *v.* Williamson, *Execution* . . 654
Wheatley *v.* Patrick, *Driving* . . . 492
Whickan *v.* Brown, *Distringas* . . 480
Whitamore *v.* Waterhouse, *Driving* . 497
White *v.* Cook, *Distringas* . . . 476
——— *v.* Johnson, *Distringas* . . . 481
——— *v.* Stratton, *Escape* . . . 614
——— *v.* Watson, *Distringas* . . . 473
Whitford *v.* Tictin, *Evidence* . . . 631
Whitehead *v.* Greetham, *Contract* . . 68
——————— *v.* Greetham, *Error, writ of* . 592
——————— *v.* Tattersall, *Covenant* . . 328
——————— *v.* Taylor, *Distress* . . 442
Whitley *v.* Roberts, *Distress* . . . 444
Whitmore *v.* Nichols, *Demurrer* . . 397
Whittaker *v.* Mason, *Contract* . . 78
Whittin *v.* Peacock, *Covenant* . . 310
Whittingham *v.* Bloxham, *Driving* . . 497
Whitworth *v.* Smith, *Distress* . . 457
Wilcock *v.* Windsor, *Courts* . . . 282
Wilder *v.* Speer, *Distress* . . . 435
Wilkinson *v.* Byers, *Contract* . . . 41
——————— *v.* Malin, *Costs* . . . 218
——————— *v.* Malin, *Error, writ of* . . 607
——————— *v.* Oliveira, *Contract* . . 42
——————— *v.* Terry, *Distress* . . . 453
Willans *v.* Taylor, *Exceptions, bill of* . 646
Willats *v.* Kennedy, *Contract* . . . 64
Williams *v.* Bagot, *Courts* . . . 278
——————— *v.* Greave, *Evidence* . . 638
——————— *v.* Holland, *Driving* . . 494
——————— *v.* Hosier, *Distringas* . . 472
——————— *v.* Jones, *Distress* . . . 463
——————— *v.* Lewsey, *Execution* . . 663
——————— *v.* Martyn, *Escape* . . . 614
Williams *v.* Price, *Distress* . . . 436
——————— *v.* Wager, *Covenant* . . . 320
——————— *v.* Wilcox, *Evidence* . . 639
Willis *v.* Bernard, *Crim. con.* . . 331
Willman *v.* Worrall, *Evidence* . . 628
Wills *v.* Bowman, *Distringas* . . . 476
Wilmot *v.* Smith, *Contract* . . . 59
Wilson *v.* Bacon, *Execution* . . 653, 660
——— *v.* Bramhall, *Deed* . . . 382
——— *v.* Butler, *Estoppel* . . . 623
——— *v.* Cutting, *Contribution* . . 85
——— *v.* Edwards, *Declaration* . . 357
——— *v.* George, *Declaration* . . 355
——— *v.* Hoare, *Copyhold, estate of* . 138
——— *v.* Minchin, *Costs* . . . 243
——— *v.* Parkins, *Costs* . . . 251
——— *v.* Powis, *Contract* . . . 67
——— *v.* Tucker, *Demurrer* . . . 399
——— *v.* Woolfryes, *Covenant* . . 316
Wintle *v.* Hogg, *Distringas* . . . 481
Wise *v.* Metcalfe, *Dilapidations* . . 425
Wollen *v.* Smith, *Discontinuance* . . 432
Wood *v.* Clarke, *Distress* . . . 447
——— *v.* Nunn, *Distress* 449
Woodcock *v.* Worthington, *Deed* . . 387
Woodhouse *v.* Jenkins, *Covenant* . . 293
Woodland *v.* Fuller, *Execution* . . 653
Woodroffe *v.* Wootton, *Costs* . . . 256
Woods *v.* Reed, *Corporation* . . . 199
Wooler *v.* Barton, *Covenant* . . . 328
Wooley *v.* Batte, *Contribution* . . 86
——— *v.* Cunningham, *Distringas* . 478
Woolf *v.* Beard, *Driving* 492
Worswick *v.* Beswick, *Declaration* . . 356
Wortley *v.* Gregory, *Distress* . . . 463
Wray *v.* Brown, *Costs* 238
——— *v.* Egremont (Earl of), *Distress* . 455
Wright *d.* Bayley *v.* Wrong, *Ejectment* . 535
——— *v.* Crookes, *Contract* . . . 79
——— *v.* Dewes, *Distress* . . . 455
——— *v.* Fairfield, *Error, writ of* . . 608
——— *v.* Nuttall, *Costs* 216
Wyatt, Ex parte, *Contempt* . . . 23

Y.

Yates *v.* White, *Damages* . . . 338
Yeoman *v.* Leigh, *Driving* . . . 496
Youde *v.* Youde, *Costs* 236
Young *v.* Maltby, *Deposit in lieu of bail* . 411
Younge *v.* Crooks, *Execution* . . 657

A

PRACTICAL ABRIDGEMENT

OF THE

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Queen's Bench, Common Pleas, & Exchequer,

FROM

MICH. TERM, 4 GEO. 4, TO MICH. TERM. 3 VICT.,

AND OF

THE RULES OF COURT, STATUTES, &c. &c. &c.

Constable*.

See also tits.

Distress,
Escape,
Game,
Highway,
Hue and Cry,
Imprisonment,
Innkeeper,
Juries,
Militia,
Poor,
Riot,
Unlawful Assembly,
Warrant.

I. RELATIVE TO THE PERSONS WHO MAY APPOINT, AND THE INSTANCES IN WHICH THEY MAY EXERCISE SUCH PRIVILEGE.

(*a*) As to high constables, p. 2.
(*b*) As to petty constables, p. 3.
(*c*) As to special constables, p. 4.

II. RELATIVE TO THE PERSONS WHO ARE ELIGIBLE AS CONSTABLES.

(*a*) In general, p. 5.
(*b*) As to particular individuals, p. 5.
(*c*) As to persons residing within privileged places, p. 6.

* The 10 Geo. 4, c. 44, regulates and appoints the new police.

(*d*) As to the discharge of privileged persons, p. 6.

III. RELATIVE TO THE ELECTION OF, p. 6.

IV. RELATIVE TO THE SWEARING OF, p. 6.

V. RELATIVE TO THE PROCEEDINGS, AND PUNISHMENT FOR REFUSING THE OFFICE, p. 7.

VI. RELATIVE TO THE DUTIES OF.

(*a*) To shew his warrant, but not to part with it, p. 8.
(*b*) To act without a warrant, p. 8.
(*c*) To act with a warrant, p. 10.
(*d*) To act within his precinct, p. 11.
(*e*) To make a legal arrest, p. 12.
(*f*) To present nuisances, p. 12.
(*g*) To continue in office until a new one is appointed, p. 13.

VII. RELATIVE TO THE RIGHTS OF.

(*a*) To appoint a deputy, p. 13.
(*b*) To be assisted, p. 13.
(*c*) To take bail, p. 13.
(*d*) To the expenses of his office, p. 14.

VIII. RELATIVE TO THE PRIVILEGES OF, p. 15.

IX. RELATIVE TO THE LIABILITIES OF.

(*a*) To actions, p. 15.
(*b*) To be indicted, p. 17.
(*c*) To be removed, p. 17.

X. RELATIVE TO PLEADINGS CONNECTED WITH, p. 17.

XI. RELATIVE TO THE EVIDENCE CONNECTED WITH, p. 17.

XII. RELATIVE TO THE COSTS CONNECTED WITH, p. 18.

I. RELATIVE TO WHO MAY APPOINT CONSTABLES.

(*a*) As to high constables.

Regina *v.* Watkinson, E. T. 1839. Q. B. 2 *P. & D.* 625.

The general quarter sessions, and not

Quo warranto against the defendant for using and exercising the office of high constable of the wapentake of A. The defendant was duly elected and admitted at the general quarter sessions, but it

appeared that a certain Christopher Edmonson, (since deceased), had previously been elected into the office at a petty sessions by the justices for the wapentake of A. also. At the trial, a verdict passed for the Crown, with leave to the defendant to move on the question whether the election was properly made at quarter sessions.

the petty sessions, must appoint the high constable*.

Per Cur.—The right of appointing is admitted on all hands to be in the general body of the justices of the peace since the disuse of the sheriff's tourn; but it was argued for the Crown that the right may be exercised by any single justice of the peace, and at all events by the regular meeting at petty sessions by those who usually act in that portion of the riding. The argument for the defendant was not directed against this doctrine when applied to the right of dealing with offenders, and acting in the ordinary course of the jurisdiction of the justices; but a difference was taken between such a proceeding and matters of election and appointment, which, being vested in the whole body, necessarily and of their own nature import that the whole body must have the opportunity of voting in the election of their officers, and that they must therefore be convened for that purpose. Manifestly this cannot be done by the justices of the peace of a single wapentake agreeing among themselves to meet and make the election. No particular method of summoning is prescribed by law, but any method which secures full notice and allows all to exercise their judgment will suffice.

(*b*) As to petty constables†.

REX *v.* BRAIN, E. T. 1832. K. B. 3 *B. & Ad.* 614.

But by statute a select vestry may choose the constable.

A LOCAL act for the government of a parish appointed trustees, among them the rector, churchwardens, and overseers for the time being, with power to thirteen or more of them to appoint four constables—

The Court held, that, at a meeting of thirteen of the trustees a

* Formerly it was decided that the sessions had no power to appoint a constable unless the court-leet neglected; (*Rex* v. *Goudge*, M.T. 1746, K. B., 2 Stra. 1213; S. P. *Anon.*, E. T. 1686, K. B., Comb. 20; S. P. *Rex* v. *Bernard*, H. T. 1696, K. B., 12 Mod. 115; S. C. Comb. 416; S. C. 1 Salk. 502; S. C. Skin. 669; S. C. 1 Ld. Raym. 94); and in that case the appointment only extended until the lord should hold a court; (*Rex* v. *Davis*, T. T. 1737, K. B., 2 Stra. 1050); but the sessions always had power to examine the legality of the election at the court-leet. (*Rex* v. *Stevens*, H. T. 1682, K. B., T. Jones, 212).

By 5 & 6 Will. 4, c. 76—In all boroughs within the late Municipal Corporation Act the constables are appointed by the watch-committee, and sworn in before some justice of the peace having jurisdiction within the borough; (and see s. 86); and such committee, or any two justices having jurisdiction within the borough, may suspend or dismiss any of them they may think negligent in the discharge of his duty, or otherwise unfit for the same; after which he shall not be re-appointed without the consent of two justices. (Id. s. 77). The watch-committee shall make regulations for preventing neglect or abuse, and for rendering such constables efficient in the discharge of their duties.

† Every petty constable being a principal peace-officer, and it being necessary for the preservation of the peace that every vill should be furnished with one, the justices of the peace have ever since the institution of their office assumed the power, as conservators of the peace, not only to swear the petty constables who have been chosen at a tourn or leet, but also to nominate and swear those who have not been chosen by them, on the neglect of the sheriff and lords of the manor. (See 2 Hawk, P. C. 610).

constable was well appointed in pursuance of the act, although the rector was not present; such trustees being empowered to elect to fill up a vacancy occasioned by a person who was a constable leaving the parish before the expiration of his year.

(*c*) As to special constables*.

* By 1 Geo. 4, c. 37, it is enacted, "That in all cases where it shall be made to appear to any two or more justices of the peace acting for any county, city, division, riding, or place, by the information on oath of five respectable householders of such county, city, division, riding, or place, that any tumult, riot, or felony has taken place or is likely to take place, and may reasonably be apprehended, such justices may and are hereby authorized to call upon, nominate, and appoint, by precept in writing under their hands, any householders or other persons (not legally exempt from serving the office of constable) residing within their respective divisions, or the neighbourhood thereof, to act as special constables for such time and in such manner as the said justices shall deem fit and necessary for the preservation of the public peace, and for the prevention or suppression of any riot or felony."

By 1 & 2 Will. 4, c. 41, s. 1, "In all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division, having a separate commission of the peace, or to any two or more justices of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act; and such justices shall be of opinion that the ordinary officers appointed for preserving the peace, and for the protection of the inhabitants and the security of the property of any such parish, township, or place as aforesaid, then such justices, or any two or more justices acting for the same division or limits, may nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable; or by sect. 2, even persons exempt, if, upon the representation of two justices, one of the principal secretaries of state order it), residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, (or residing elsewhere, if willing, 5 & 6 Will. 4, c. 43), to act as special constables, for such time and in such manner as to such justices shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants and the security of the property in such parish, &c.; Provided that whenever it shall be deemed necessary to nominate and appoint such special constables as aforesaid, notice of such nomination and appointment, and of the circumstances which have rendered the same expedient, shall be forthwith transmitted by the justices making the same to one of the principal secretaries of state and to the lieutenant of the county."

See 1 & 2 Will. 4, c. 41, which regulates the oath, when and where they may act, how long their service continues, and effect of refusing to serve. With respect to borough special constables, the 5 & 6 Will. 4, enacts, "That, in October in every year, any two or more justices of the peace of any borough shall nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the inhabitants of such borough, (not legally exempt from serving the office of constable), to act as special constables within such borough whenever thereunto required by warrant from any justice of the borough, but not otherwise; and every such warrant shall recite, that, in the opinion of the justice granting the same, the ordinary police force of the borough is insufficient to maintain the peace of the borough." (c. 76, s. 83).

II. RELATIVE TO THE PERSONS WHO ARE ELIGIBLE AS CONSTABLES.

(*a*) In general*.

Rex *v.* Adlard, M. T. 1825. K. B. 4 *B. & C.* 772; S. C. 6 *D. & R.* 340.

A person merely carrying on trade without residence is not an inhabitant bound to serve as a constable.

The defendant occupied a house and paid all parish rates in respect of it, and carried on the trade of a printer, frequented the house daily in all working days, and sometimes remained there during the night at work, but did not sleep in the house—

The Court held he was not liable to serve the office of constable in the parish where the house was situate.

Rex *v.* Oswald, T. T. 1835. K. B. 5 *N. & M.* 261; S. C. 3 *Ad. & E.* 488.

But in a subsequent case it was decided, that where a party has a warehouse and a lodging elsewhere, he is bound to serve as constable at either; but a fine of 300*l.* for not serving is excessive.

In this case the question was, whether a person who occupied and was rated for a warehouse, and occupied lodgings in which he slept four or five nights in every week within the same constablewick, was liable to be chosen constable of such constablewick.

Per Cur.—We see no reason why a man should not be liable to serve in several lists. If he had been already chosen constable for the ensuing year in one place, that might be an excuse for not serving in the other for the same year, for a man cannot duly serve that office in two places at the same time. We find this passage:—"A. was actually constable of the hundred of B., and lived at W. within the hundred of B. in Essex, and being chosen collector for the poor in Cornhill in London, where he first lived, a writ of privilege was moved for and granted, 3 Keb. 267, pl. 267, pl. 16, *Rex* v. *Rice;*" and in the margin this is added, "2 Jo. 46; Price's case, S. C.;" and he was discharged till his office of constableship should expire. But the fine of 300*l.* for not serving an office is excessive when the highest previous fine was 100*l.*, and was sufficient to produce an acceptance of the office.

(*b*) As to particular individuals†.

* All inhabitants are eligible, (*Anon.*, 12 Mod. Rep. 356), except as infra, and unless specially privileged, as by a grant of exemption from the Crown; (*Rex* v. *Clarke*, E. T. 1787, K. B., 1 T. R. 679); or statutable certificate; but a certificate of exemption from all ward offices does not apply to the office of constable. (*Rex* v. *Darbyshire*, H. T. 1760, K. B., 2 Burr. 1182).

† Aged persons, incapacitated by weakness, are ineligible as constables; and in Westminster persons above sixty-three years of age are expressly exempted by the 31 Geo. 3, c. 17, s. 13. So, aldermen are not bound to serve the office of constable. (See Cro. Car. 585; 1 Jones, 462; 2 Hawk., P. C., c. 10, s. 40). By the 6 & 7 Will. 3, c. 4, apothecaries in London, and within seven miles thereof, being free of the company of apothecaries, and also those in the country who have served seven years apprenticeship, are exempt from being called on to act as constables; but an officer in the army is not privileged, notwithstanding he is bound by his office to personal attendance on the King's person, because the office, being of late constitution, shall not prevail against an ancient custom; (see 2 Hawk., P. C. c. 10, s. 41; 1 Lev. 233); and attornies are privileged from serving the office of constable; (*Poordage's case*, 1 Mod. 22; S. P. *Stone's case*, E. T. 1669, K. B., 1 Vent. 16; see Noy, 113; Cro. Car. 389; Mar. 30); so, a barrister is not liable

(*c*) As to persons residing in privileged places*.

(*d*) As to the discharge of privileged persons†.

III. RELATIVE TO THE ELECTION OF‡.

IV. RELATIVE TO THE SWEARING OF.

Rex *v.* Brain, E. T. 1832. K. B. 3 *B. & Ad.* 614.

A refusal to be sworn§ is a refusal to take office.

Indictment stated, that the defendant was duly elected to serve as constable; and then charged in general terms, that he neglected and refused to execute the office—

The Court held, that it being the general custom to swear in all constables appointed at any intermediate period, at a different place than when sworn in at the usual time, the party having been duly summoned to be sworn in at such place, a refusal to be sworn in was evidence to support a charge of refusing to take the office; and it was not necessary in the indictment to state the special mode of

to serve the office of constable; (*Poordage's case*, 1 Mod. 22; see 2 Hale, P. C. 103); but custom-house watchmen are not exempt. (*Roy* v. *Clark*, T. T. 1664, K. B., Sid. 272).

By 1 Will. 3, c. 18, s. 11, dissenting ministers are exempt from serving. Naturalised foreigners are ineligible as constables. (*Rex* v. *Ferdinand de Mierre*, T. T. 1771, K. B., 5 Burr. 278). The inspectors of lottery-offices were liable; (*Rex* v. *Wood*, T. T. 1795, K. B., 1 Esp. 358); so justices of the peace in another county are eligible. (*Delamotte's case*, E. T. 1724, K. B., 1 Stra. 698).

No serjeant, corporal, nor private man, serving in the militia, shall, during the time of such service, be liable to serve the office of such constable; (see 26 Geo. 3, c. 107); so, by 31 Geo. 3, c. 32, Roman Catholic ministers, on taking the oaths of conformity to the regulations of that statute, are exempted. It seems a practising physician may be chosen; (see 2 Hawk. P. C. c. 10, s. 41; 1 Sid. 431; 1 Mod. 22; 2 Keb. 578); unless he be a president or fellow of the College in London. (32 Hen. 8, c. 40). Publicans cannot be constables. (*Anon.* M. T. 1703, K. B., 6 Mod. 42). Servants of members of Parliament are exempt. (See 2 Hawk. P. C. c. 10, s. 39; 10 Geo. 3, c. 50). By custom, it seems that other surgeons as well as members of the college are exempt from being chosen constables. (*Rex* v. *Pond*, M. T. 1718, K. B., 1 Com. 312).

By 22 Geo. 3, visitors of poor-houses were exempt from all parochial offices. By the 57 Geo. 3, c. 44, members of volunteer corps are exempt from the office of constable. *Women may* be chosen *as constables*. (*Rex* v. *Stubbs*, E. T. 1788, K. B., 2 T. R. 406).

* A college barber at Oxford, though he resides in the city out of the college, seems exempt from serving the office of constable, being entitled to the privileges of the University. (*Rex* v. *Routledge*, 8 Doug. 531).

† If a privileged person be improperly chosen constable, it seems such person may be relieved by the Court of K. B. (See 2 Hawk., P. C., c. 10, s. 41).

‡ On an application for a quo warranto against a constable, the affidavits must, in negativing his due election, expressly shew an unequivocal custom to elect in a particular manner. (*Rex* v. *Lane*, H. T. 1822, K. B., 5 B. & Ad. 488; S. C. 1 D. & R. 76).

§ One magistrate may swear in a constable. (*Rex* v. *Franchard*, H. T. 1742, K. B., 2 Stra. 1149). And to compel the swearing, a mandamus lies to the steward of a court-leet. (*Davenport* v. *Israel*, T. T. 1694, K. B., Comb. 283). No particular form being directed by any statute for the constable's oath, it has long been the practice to swear them generally "to the due execution of the duty as constables till others are appointed in their places." (Dick. Sess. Guide, 62). The persons elected must, it seems, be summoned and directed when and where to take the oaths of office. (*Fletcher* v. *Ingram*, 5 Mod. 129).

swearing in; and it sufficiently charged an offence in alleging the refusal to take upon himself the office of constable without specifically alleging the refusal to take the oath of office.

REX *v.* ROBERTS, T. T. 1835. K. B. 5 *N. & M.* 130; S. C. 3 *Ad. & E.* 771.

The constable must be duly sworn before he can hold office.

BY the charter of the borough of Caernarvon, the constable of the castle of C. for the time being was to be mayor of the borough, sworn to the king and the burgesses; and who, having first taken the oath to preserve the King's rights, should swear to the burgesses to preserve their liberties, and faithfully to do the things appertaining to the office of mayoralty. Before stat. 57 Geo. 3, c. 45, (for continuing civil and military offices held of the Crown during pleasure, after the death of Geo. 3, at the pleasure of his successors), the King granted to A., by letters patent, the office of constable, to be exercised by himself or deputy during the King's pleasure. A. took the oaths, and held the office till the death of Geo. 4, and during the six months granted by stat. 6 Anne, c. 7, s. 8, and also till a second grant by letters patent of the King, made after the expiration of those six months, but before the expiration of the additional six months given by stat. 1 Will. 4, c. 6. The second grant recited the former grant, and that the King was pleased to renew the appointment, and continue A. in the office, and then granted as before; and A. took the oaths again. After the first grant and before the second, A. appointed the defendant his deputy; and after the second grant, but before A. had taken the oaths a second time, A. again appointed and continued him as his deputy.

The Court held, that A. could not exercise the office of constable till he was sworn; that the second grant to A. was not a confirmation, but a new appointment, and that, consequently, it was necessary that A. should be sworn again before he could exercise the office; and that, supposing A. to have the power of appointing a deputy at all, the defendant not having been re-appointed deputy after A. had taken the oaths a second time, was not entitled to hold that office.

V. RELATIVE TO THE PROCEEDINGS AND PUNISHMENT FOR REFUSING THE OFFICE. See also, ante, Div. II.

REGINA *v.* VINCENT, 1839, N. P. 9 *C. & P.* 91.

A refusal to serve as constable is an indictable offence*.

IN this case a witness stated:—I am a magistrate. I had great difficulty in getting special constables. At several of the iron works the men all refused.

Alderson, B.—Did you indict them for refusing? Witness replied in the negative.

Alderson, B.—You had better do so, if it occurs again.

* Or the party may be amerced at the court-leet. (*Rex* v. *Lane*, 2 Stra. 920). But the penalties incurred cannot be distrained for in the absence of an express custom authorizing the distress. (*Fletcher* v. *Ingram*, H. T. 1696, K. B., 1 Salk. 175; S. C. 5 Mod. 129; S. C. 1 Ld. Raym. 69; S. C. Comb. 350; S. C. Holt, 187).

VI. RELATIVE TO THE DUTIES OF*.

(*a*) To shew his warrant, but not to part with it †.

(*b*) To act without warrant ‡.

BECKWITH *v.* PHILBY, E. T. 1827. K. B. 6 *B. & C.* 635.

A constable may detain on suspicion of felony, but not a private individual, unless a felony has been actually committed.

TRESPASS for false imprisonment against the defendants, constables. It appeared, that, in the evening, the plaintiff was observed sitting on the bridge of Loughton, in the county of Essex, by a person who happened to be passing, and who, thinking there was some cause for suspicion, went to the defendant Philby, and desired him to "look well after" the plaintiff. Philby went to the plaintiff, and told him that he was come to take him into custody. The plaintiff said he would not be taken, offered to strike Philby, and desired him to shew his authority. Philby said he was the high constable, and called for assistance; when the plaintiff said he would not be collared by any two men, threatened to knock any one down who should collar him, and attempted to go away. He refused to give his name, and resisted being searched. The defendant Philby, however, being assisted by other persons, having succeeded in search-

* It is the duty of constables to enforce the penalties against ale-house keepers; (see 1 Jac. 1, c. 9; 3 Car. 1, c. 4; 26 Geo. 2, c. 31); to make an assessment for the repairs of bridges; (1 Hawk. P. C. c. 77, s. 7); to pursue burglars; (Cro. Eliz. 16); to assist in the management and enforcement of the customs; (12 Car. 2, c. 19; 13 & 14 Car. 2, c. 11); to prevent drunkenness; (4 Jac. 1, c. 5); to pursue felons and keep the goods found on them until trial, and then return them as directed by the Court; to assist at fires; to enforce the statutes against unlawfully fishing; to assist in forcible entries; (5 Rep. 2); to assist in putting the statutes in force against hawkers and pedlars; (8 & 9 Will. 3, c. 25; 11 Geo. 2, c. 26); to suppress illegal lottery offices; (27 Geo. 3, c. 1); to search and examine if any person use other measures than those agreeable to the standard; (37 Geo. 2, c. 17); to make presentments against a breach of the peace; (Dalt, J. P. 474); to assist in levying duties on servants; (25 Geo. 3, c. 43); to enforce acts against the profanation of a Sunday; (1 Car. 1, c. 1; 29 Car. 2, c. 7); to levy penalties for swearing; (see 19 Geo. 2, c. 21); to assist in enforcing the laws regulating turnpikes; to assist in enforcing the laws against vagrants; and to assist in saving ships from wrecks. (12 Ann. st. 2, c. 18). Formerly it was deemed a duty of constables to make presentment of all offences committed within their respective constablewicks, at the petty sessions holden next before the assizes or quarter sessions, and which were then returned to the assizes or sessions by the justices; but this has been virtually abolished by statute 7 & 8 Geo. 3, c. 38.

† It is the duty of a constable executing a warrant, if required, to shew the same to the person against whom it issued; (see 27 Geo. 3, c. 20); unless he be sworn and commonly known to be an officer, and act within his own precincts, then he need not shew his warrant to the party, notwithstanding he demand the sight of it; (see 2 Hawk. P. C. c. 13, s. 28; 1 Hale, P. C. c. 458; 1 East, P. C. 319); but in no case is a constable justified in parting with the warrant out of his own possession. (See 1 East, P. C. 319).

‡ By the Municipal Corporation Act, (5 & 6 Will. 4, c. 76, s. 78), "such constable, during the time of his being on duty, may apprehend all idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of intention to commit a felony," and deliver them into the custody of the constable in attendance at the nearest watch-house, in order that they may be secured until they can be brought before a justice of the peace, or give bail, conditioned for their appearance before a justice, if the constable think fit to take it.

ing him, found in his pockets some sovereigns and some oats and beans. The plaintiff, speaking of the oats and beans, said "they are good ones, they will run after them." There was also a saddle lying at his feet, and he took a bridle out of his pocket, and a spur, and said, "This will do to touch them up on the road." The jury found for the defendants—

Per Cur.—The question here was, whether there was reasonable cause to suspect that a felony had been committed, or that there was an intent to commit a felony. That was a question solely for the jury; but whether a constable or police officer may apprehend a person under such circumstances as appeared in this case is a question of law. A private individual, indeed, cannot justify such a detention, unless a felony has been committed; a constable may on suspicion. Here the plaintiff had all the materials to lead to the suspicion that he came to decoy, and to steal a horse: he had a bridle, a saddle, and a spur, to ride that horse away; and when questioned, and taken into custody, he refused to give his name, and resisted the constable. We cannot say, therefore, that the verdict was wrong.

STOCKEN *v.* CARTER, H. T. 1831. N. P. 4 *C. & P.* 477.

Merely conversing with a reputed thief is no ground for taking a person into custody.

IN an action of trespass, it appeared that the plaintiff was talking to a reputed thief, when the defendant, an inspector of police, called out, "Ladies and gentlemen take care of your pockets, you have got pickpockets and thieves here among you;" and immediately pushed plaintiff with his hand, saying, "You had better be off;" that the plaintiff remonstrated, and said that he was not a thief or a pickpocket; but that the defendant kept pushing him repeatedly, and telling him to be off; that the plaintiff told him his name, and where he lived, to which the defendant replied—"I know you well; I know what you are, and where you live; you had better be off, or I'll put you somewhere, which you won't like;" all the time keeping his hand on his collar; and that at last he gave him a violent push into the road—

Gaselee, J., held, that a police constable was not justified, under the stat. 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief.

COOK *v.* NETHERCOTE, 1835. N. P. 6 *C. & P.* 741.

And a constable has no right to interfere after an affray is over*.

IN trespass, it appeared that the plaintiff, a constable, received serious injury from the defendant in resisting the apprehension of a party alleged to have been engaged in a previous affray—

The Court held, that, in order to justify the plaintiff in apprehending the defendant, the jury must be satisfied that the defendant had been engaged in the affray, and that the affray was continuing at the time of the plaintiff's coming up; a constable cannot apprehend after an affray is over, without warrant.

See Clifford v. *Brandon*, 2 *Campb.* 358.

* But see 2 & 3 Vict. c. 47, s. 65. And before that statute, a policeman, hearing a disturbance in a public-house, entered, the door being open:—Held, not a trespasser so as to justify an assault upon him. (*Rex* v. *Smith*, 1833, N. P., 6 C. & P. 351).

REX *v.* CLARKE, E. T. 1835. K. B. 4 *N. & M.* 671.

But where a tax-collector is apprehensive of violence, a constable, who enters to preserve the peace, is justified.

A TAX-COLLECTOR, after a previous refusal and neglect to pay the taxes demanded, and threats of violence if a distress were made, had taken with him constables, with a view to his protection, not for the purpose of annoyance, but at the time intending to distrain, and left them outside the house; and after he had entered, the defendant went out of the room, and was heard fastening the outer door; upon which the collector desired a party with him to open it, and let in the constables, which was done: the defendant shortly afterwards returned with eight or ten persons, whom he ordered to turn out the constables; upon which a scuffle and assault ensued: the jury having found that the collector had called in the constables upon a reasonable apprehension of mischief intended against him—

The Court held, that, upon the ground of the general duty of the constable, and the general right of every person in the execution of a public duty to have the protection of the law, without any regard to the provisions of the 38 Geo. 3, c. 5, the constables were lawfully in the house for the purpose of aiding and assisting in the prevention of a breach of the peace. The power, under the statute, of calling in a constable, is only in cases where it is necessary to break open chests or boxes, and where the collector has a special warrant.

(*c*) TO ACT WITH A WARRANT*.

CROZIER *v.* CUNDEY, H. T. 1827. K. B. 6 *B. & C.* 232.

A warrant, authorising a constable to seize certain articles, does not sanction his taking other things not specified, where they furnish no evidence of guilt.

TRESPASS for breaking and entering the plaintiff's dwelling-house, making a noise and disturbance therein, searching, rummaging, and ransacking the dwelling-house, and the drawers and cupboards therein, throwing about the goods and damaging the furniture, and seizing and taking away 5cwt. of cotton copps, a pan, and a sieve, the property of the plaintiff. It appeared, that the defendants, on the —— of January, 1826, came to the plaintiff's house with a warrant, under the hand and seal of Mr. Jebb, which recited an information laid before him by the defendant Cundey, that certain goods, to wit, about 100lbs. of cotton copps, the property of himself and his brother, had been feloniously stolen; and that he had cause to suspect that they were concealed in the plaintiff's dwelling-house. The warrant then authorized the constable of Walton, and also one George Evans, to search the house of the plaintiff for the said goods; and if the same, or any part thereof, were found, then to bring the plaintiff before him, the said magistrate. The defendants were accompanied by George Evans, to whom the warrant was directed: they found the cotton mentioned in the warrant. Cundey then said there were other things; and thereupon a further search took place. A bonnet-box was thrown by one of the defendants into the middle of the room; other boxes were opened; the beds and linen were thrown upon the floor. The defendants remained in the house

* It is the duty of a constable not to go beyond the power conferred on him by warrant; (*Anon.*, M. T. 1699, K. B., 12 Mod. 344); but to act strictly as it directs. (*Reg.* v. *Tooley*, M. T. 1709, K. B., 11 Mod. 248).

nearly half an hour after the cotton was found; and ultimately took away a tin pan and a sieve, besides the cotton. Upon this evidence the defendants' counsel submitted, that the plaintiff ought to be nonsuited, he not having demanded a copy of the warrant according to 24 Geo. 2, c. 44, s. 6; and under which the defendants contended that they were justified. The Judge thought they were not justified in removing the tin pan and sieve, or in ransacking the house after the cotton was found; but he thought that the demand of the copy of the warrant was essential previous to the plaintiff's right to bring the action; because, until the warrant was seen, it could not be ascertained whether the defendants were or were not protected by it. He, therefore, nonsuited the plaintiff.

Per Cur.—This rule must be made absolute. If the articles, which had been seized, and not mentioned in the warrant, had of necessity been seized, in order to assist in proof of the identity of the other articles, the defendants might have been justified; but that does not appear to have been the case.

(*d*) To act within his precinct.

GLADWELL *v.* BLAKE, M. T. 1834. Ex. 1 *C., M. & R.* 636; S. C. 5 *Tyrw.* 186.

A bench-warrant is not within the 5 Geo. 4*; and a constable cannot execute it without his jurisdiction.

A WARRANT issued by a Judge of the Court of K. B. was executed by a constable, to whom it was not directed by name, out of his district. In an action against the constable—

The Court held, that the plaintiff was not bound to demand a perusal and copy of the warrant under 24 Geo. 2, c. 44, s. 6. The statute 5 Geo. 4, c. 18, s. 6, which authorizes constables to arrest persons out of their own district, though the warrant be not directed to them by name, does not apply to cases where warrants are issued by the Judges of the Court of King's Bench, but is confined to warrants issued by justices of the peace, of limited jurisdiction.

* By 5 Geo. 4, c. 18, constables are authorized to execute warrants out of their own precincts, provided it be within the jurisdiction of the justices granting and backing the same. A warrant directed to a constable by his name of office not only gives him an authority to act beyond the limits to which his office extends; but, if addressed to him by name, he may execute it any where within the limits of the magistrate's authority. (*Rex* v. *Weir*, E. T. 1823, K. B., 1 B. & C. 288; S. C. 2 D. & R. 444; S. P. *Case of Village of Chorley*, T. T. 1699, K. B., 1 Salk. 176; S. C. 3 Salk. 98; S. P. *Milton* v. *Green*, T. T. 1804, K. B., 5 East, 233; S. P. *Blatcher* v. *Kemp*, Sum. Ass. 1782, 1 H. Bl. 15, n.)

By the Municipal Corporation Act (5 & 6 Will. 4, c. 76), the constable appointed and sworn as there directed shall, "not only within the borough, but also within the county in which such borough, or part thereof, shall be situated, and also within every county, being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities as any constable duly appointed now has, or hereafter may have, within his constablewick, by virtue of the common law of this realm, or of any statute made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within such borough, or within any county in which they shall be called on to act as constables, for the conducting themselves in the execution of their office."

(*e*) To make legal arrest*.

SMASON *v.* COPE, M. T. 1831. N. P. 5 *C. & P.* 193.

A constable, in clearing a passage in a crowd, has no right to strike a party; he must remove him.

THE defendant, one of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back; and on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him.

Tindal, C. J., held, that in doing so the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time, to afford an opportunity for removing the party in a more peaceable way.

(*f*) To present nuisances.

REX *v.* BRIDGEWATER AND TAUNTON CANAL COMPANY, M. T. 1827. K. B. 7 *B. & C.* 514.

The presentment of a nuisance by a constable must be before a grand jury, on oath.

ON a certiorari to remove a presentment, it appeared from the affidavits that the usual practice as to presentments made by constables, which has prevailed for a number of years at the quarter sessions in the county of Somerset, and at the assizes on the Western, Norfolk, and Home circuits, is for the constables of hundreds to be sworn in open court by a general oath, to present all nuisances, &c., within their respective hundreds; that the constable who has any offence to present then informs the clerk of indictments of the nature of that offence, who thereupon draws up the form of a presentment, which the constable signs; that subsequently the clerk of indictments draws another presentment or indictment, containing in substance the original presentment, signed by the constable, to which he annexes that original presentment, and indorses a memorandum thereon, that the proceeding is upon the presentment of the constable who has made it. The two presentments thus connected together are then filed with the clerk of assize or of the peace, without being submitted to or returned by the grand jury, and without the constable who has made such presentment going before, being sworn or being examined by, the grand jury. The presentment last drawn

* It being the duty of a constable to make arrests, if he be killed in executing it, it is murder; (*Rex* v. *Tooley*, M. T., 1708, K. B., 11 Mod. 242; S. C. 2 Ld. Raym. 1295; S. C. Holt, 485); and if a felon in any case resist or flee, whether after arrest or before, and cannot be taken, the constable may kill him, and such killing is justifiable. (See 1 Hale, P. C. 481; 2 Hale, P. C. 90). When a felony has actually been committed, the constable, or any person, upon probable grounds of suspicion, may lawfully apprehend the person suspected, and carry him before a justice; (Cromp. J. P. 153, b.—201, b.; 2 Hale, P. C. 9; 11 Mod. 248; 2 Hawk. P. C., c. 11, s. 15); and in case of a felony committed, or danger of its being committed, or apprehended, the constable, either upon complaint or hue and cry, may break open the doors to take the offender, if upon demand and notice he will not yield himself, or entrance be refused, or if the constable act under a magistrate's warrant, for treason or felony. (See 2 Hale, P. C. 82; Cromp. J. P., 141; Brownl. 211; 1 Bulst. 146). So, the constable may officially imprison for a time to prevent felony; as if he see two with weapons drawn ready to fight. (See Moor, 284; Poph. 13).

in this case was in the common form of presentments by the grand jury; that is to say, it commenced by stating, "the jurors for our lord the king, upon their oath, present &c.;" and the usual mode of making, preparing, and filing it, as above described, had been pursued.

Per Cur.—If the constable, upon his own knowledge, can present, of course, upon that same knowledge, he may go before the grand jury and make his presentment upon oath. Such a presentment, we are of opinion, ought to be made upon oath before the grand jury, and it ought, to be of any force, to be returned by them. This indictment states in terms, that "the grand jurors upon their oaths present"; and yet it is proved never to have been before the grand jury. The averment of this fact, therefore, is manifestly untrue; nor ought any man to be put upon trial except upon oath.

(*g*) To continue in office until a new one is appointed*.

VII. RELATIVE TO THE RIGHTS OF.

(*a*) To appoint a deputy †.

(*b*) To be assisted ‡.

(*c*) To take bail §.

* It is a constable's duty to continue in office until a new one be appointed. (*Anon.* M. T. 1697, K. B., 12 Mod. 256). And by the 13 & 14 Car. 2, c. 12, s. 15, if a constable shall continue above a year in his office, the sessions may discharge him and put another in his place, till the Court shall hold a leet.

† A constable may appoint a deputy; (*Peake* v. *Bourne*, M. T. 1734, K. B., 2 Stra. 943; S. P. *Pane's case*, H. T. 1668, K. B., 1 Ibid. 355); on the appointment of whom the principal's responsibility ceases. (*Underhill* v. *Witts*, M. T. 1799, N. P. 3 Esp. 56; Vane's case, 2 Keb. 309).

‡ Refusing to assist a constable is an indictable offence. (*Rex* v. *Wildbore*, M. T. 1694, K. B., Comb. 309). But where a person assisted a constable, who was making an illegal arrest, and another person, in endeavouring to rescue her suddenly, and without any precedent malice, killed the man who was acting by the command and in aid of the constable, it was holden manslaughter and not murder. (*Rex* v. *Tooley*, M. T. 1709, K. B., 11 Mod. Rep. 242; S. C. 2 Ld. Raym. 1296; S. C. Holt, 485).

§ By Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 79—"And where any person is brought in custody to the watch-house, 'charged with any petty misdemeanor, the constable in attendance may, if he think fit, take bail in recognisance for his appearance within two days, before a justice of the peace, at a time and place to be specified; and shall enter in a book, to be kept for that purpose in every watch-house, the names, residence, and occupation of the party, and his surety or sureties, (if any), entering into such recognisance, together with the condition thereof, and the sums respectively acknowledged, and shall lay the same before such justice as shall be present at the time and place when and where the party is required to appear; and if the party does not appear at the time and place required, or within one hour after, the justice shall cause a record of the recognisance to be drawn up, to be signed by the constable, and shall return the same to the next general or quarter sessions of the peace for the borough, or for the county in which such borough is situate, in those boroughs for which there shall be no separate or general quarter sessions of the peace, with a certificate at the back thereof, signed by such justice, that the party has not complied with the obligation therein contained; and the clerk of the peace shall make the like extracts and schedules of every such recognisance, as recognisances forfeited in the sessions of the peace; and if the party not appearing shall apply by any person on his behalf to postpone the hearing of the charge against him, and

(*d*) To the expenses of his office*.

REX *v.* JUSTICES OF LEICESTER, T. T. 1827. K. B. *7 B. & C.* 6.

The high constable is entitled to the compensation paid by him to special constables in cases of riot.

RULE nisi to remove an order of justices, and an order of sessions, made in confirmation thereof, into this Court. The order was:—"Whereas application has been made to us, two of the justices of the peace, acting in and for the said borough of Leicester, by George Owston, high constable of the said borough, for the extraordinary expenses incurred by him in the execution of his duty as such high

the justice shall think fit to consent thereto, the justice shall be at liberty to enlarge the recognisance to such further time as he shall appoint; and when the matter shall be heard and determined, either by the dismissal of the complaint, or by binding the party down to answer the matter thereof at the sessions or otherwise, the recognisance for the appearance of the party before a justice shall be discharged, without fee or reward."

* By 27 Geo. 2, c. 20, the constable executing a justice's warrant for levying a penalty or other sum of money directed by an act of Parliament by distress may deduct his own reasonable charges for taking and keeping and selling the goods distrained, returning the overplus on demand, after such penalty or sum of money and charges deducted. A person committed to gaol for any misdemeanor shall bear his own charges, (if able), for conveying or sending him to the said gaol, and the charges of those that guard him thither; and if he shall refuse at the time of commitment to defray the same, or shall not then pay the same, the justice committing him shall by warrant to the high or petty constable where the person shall inhabit, or from whence he shall be committed, or where he shall have any goods within the county, order so much to be sold thereof as by his direction shall satisfy the same, the appraisement to be made by four honest inhabitants. (3 Jac. 1, c. 10). And if he have not money or goods within the county sufficient to bear the charges of himself and those who convey him to the gaol or house of correction, the constable may make application to a justice, who may upon oath examine into and ascertain the reasonable expenses, and shall by his warrant, (without fee), order the treasurer to pay the same, except in Middlesex, where the same shall be paid by the overseers of the parish where the person was apprehended. (27 Geo. 2, c. 3). And by the 41 Geo. 3, c. 78, two justices may order an allowance to be made to any constable for extraordinary expenses incurred in the execution of their duty in cases of tumult, riot, or felony, such order to be submitted to the sessions for their allowance; a mandamus lies to reimburse constables as to extraordinary expenses. *Rex* v. *Hunt*, H. T. 1718, C. P., 1 Stra. 42, 93). But a constable, who apprehended a party for a misdemeanor committed in his presence in a chapel, and conveyed him before a magistrate by whom he was bound over to prosecute, and who expends money in carrying on such prosecution, such expenses cannot be included in his accounts under the 18 Geo. 3, c. 19, s. 4, as monies expended on account of the township; (*Rex* v. *Seville*, M. T. 1821, K. B., 5 B. & A. 180); nor expenses incurred by a constable in indicting a party for assaulting him in the execution of his office, although the prosecution was directed by a magistrate. (*Rex* v. *Bird*, E. T. 1819, K. B., 2 B. & A. 522). By the 41 Geo. 3, c. 78, two justices of the peace may order proper allowances to be made to special constables for their expenses and loss of time, which order shall be submitted to the quarter sessions."

By 5 & 6 Will. 4, c. 76, s. 82—"The treasurer of the borough shall pay the constable such salaries, wages, and allowances, and at such times as the watch-committee (subject to the approbation of the council) direct; and the council shall order to be paid any extraordinary expenses which such persons shall appear to have necessarily incurred in apprehending offenders, and executing the orders of any justice of the peace having jurisdiction within such borough, such expenses having been first examined and approved by such justice; and the said treasurer shall also pay such further sums as the watch-committee, (subject to the approbation of the council), award to any of the constabulary force as a reward for extraordinary diligence or exertion, or as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received or shall be worn out by length of service, and all other charges and expenses which the watch-committee shall, (subject to the approbation of the council), direct to be paid, for the purposes of the constabulary force under this act."

constable, in several cases of tumult, riot, and felony, occurring within the said borough, as well before as during the continuance of a contested election for a member of Parliament recently had therein; and we, having examined into and considered the same, do hereby allow and adjudge to him, the said George Owston, the sum of 1,343*l.* 17*s.*, as and for the reasonable and necessary allowances to be made to him, for his extraordinary expenses upon the occasion aforesaid. And we do hereby, in pursuance of the statute in such case made and provided, order and direct you, the said treasurer of the said borough of Leicester, to pay to him the said George Owston, so being such high constable as aforesaid, the said sum of 1,343*l.* 17*s.*, as and for such reasonable and necessary allowances, so by us adjudged and allowed to him for his extraordinary expenses in the execution of his duty in the said several cases of tumult, riot, and felony aforesaid. Given under our hands and seals this 10th day of October, 1826." (Signed by justices).

Per Cur.—It is objected to this order, that, in respect of money paid voluntarily by the high constable, as this has been, the justices are not empowered by the act to order him to be reimbursed. We thing the construction contended for is much too narrow; it cannot have intended to confine expenses to those of a personal nature, because the statute, it will be observed, directs reasonable and necessary allowances to be made for "extraordinary expenses incurred in cases of tumult, riot, or felony." Nor is the remuneration to special constables, under the 1 Geo. 4, in any way inconsistent with this view. To the objection, that these payments might not be made through the medium of the high constable, if the special constables have been sworn in by the high constable, and have been paid by him, he is entitled to be reimbursed; but where they have been sworn without his intervention, they can apply to the sessions, who, under the 1 Geo. 4, are empowered to make them an allowance for their services. It has also been said, that regular and ordinary constables have in no case a right to be paid for the discharge of their duty. But the statute, 18 Geo. 3, c. 19, s. 4, which requires constables at stated periods to deliver accounts, would rather imply the contrary, and that, in the event of any extraordinary labour, they are to have an allowance made to them.

VIII. RELATIVE TO THE PRIVILEGES OF*.

IX. RELATIVE TO THE LIABILITIES OF A CONSTABLE.

(*a*) To actions†.

BALLINGER *v.* FERRIS, T. T. 1836. Ex. 1 *M. & W.* 628; S. C. 1 *T. & G.* 920.

A constable who considers

TRESPASS for assaulting and imprisoning the plaintiff, and detaining him until he delivered up a certain horse in order to procure

* A person acting as constable is not bound to serve in any other parish office. (*Anon.*, E. T. 1674, K. B., T. Jones, 46).

† By the statute 24 Geo. 2, c. 44, s. 6, it is enacted, "That no action be brought against any constable, headborough, or other officer, or against any person acting

he is acting bonâ fide is entitled to notice of action under the 7 & 8 Geo. 4, c. 30*.

his liberation; and in the second count until he paid the sum of 30*s.* Plea, the general issue. It was proved that on the 3rd of August, the plaintiff, who was a waggoner, was driving a timber waggon along one of the streets at Chepstow into a timber-yard, and in his course, either through inadvertence or carelessness, upset a donkey cart in the road, and injured both the cart and the donkey. A short time afterwards, the defendant, who was a policeman for the town of Chepstow, took the plaintiff into custody; and he was detained until he gave one of the horses out of his team as a security, which was afterwards redeemed by the payment of 2*l.* The defendant's counsel contended, that there ought to have been a notice of action in this case according to the 7 & 8 Geo. 4, c. 30, s. 41, the defendant being a constable and acting under that act. The plaintiff however had a verdict. On motion for a nonsuit—

Per Cur.—We are all of opinion that the defendant acted illegally: but the question is, whether he acted under a supposition he was justified in doing what he did. If he did, he is entitled to notice of action. Rule absolute.

by his order, and in his aid, for any thing done in obedience to the warrant, under the hand and seal of any justice of the peace, until demand hath been made, or left at the usual place of his abode, by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand; and if after compliance any action shall be brought against such constable, headborough, or other officer, or against such person acting in his aid, for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, or producing such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice or justices. And if such action be brought jointly against such justice or justices, and also against such constable, or other officer, &c. on proof of such warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict be given against the justice or justices, the plaintiff shall recover his costs against him, to be taxed in such manner by the proper officer, as to include such costs as the plaintiff is liable to pay to such defendant, for whom such verdict shall be found as aforesaid."—From this clause it seems, that the constable ought not to return the warrant to the justice, but to keep it for his own justification; for he cannot grant to the party the perusal of the warrant, unless he has it; but he must certify to the justice what he has done in the execution thereof. Constables are only within the statute 24 Geo. 2, c. 44, s. 6, when they act in obedience to the justices' warrant. (*Milton* v. *Green*, T. T., 1804, N. P., 5 East, 233; S. C. 1 Smith, 402).

By the 24 Geo. 2, c. 44, no action shall be brought against any constable acting as directed by the statute, but within six calendar months after the act committed. But the statute only applies to cases where the officer acts under a warrant. (*Postlethwaite* v. *Gibson*, M. T. 1809, N. P., 3 Esp. 226).

The giving a party into custody upon a fair belief of his having committed a felony:—Held, not to bring the party within the 7 & 8 Geo, 4, c. 29, which extends only to constables, &c., entitling them to notice of action. (*Brooker* v. *Field*, N. P., 9 C. & P. 650).

* The 7 & 8 Geo. 4, c. 29, s. 41, enacts, "That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed and not afterwards; and notice in writing of such action, and the cause thereof, shall be given to the defendants one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought."

COLLINS *v.* ROSE, M. T. 1839. Ex. 7 *D. P. C.* 796; S. C. 5 *M. & W.* 194.

THE plaintiff made the following demand of a copy of the warrant, under 24 Geo. 2, c. 44, s. 6:—"To James Rose, Haddenham, Bucks. I do hereby demand of you to deliver to me, within three days from the date of this demand, a full, true, and correct copy of the warrant, &c., &c." It was contended that the demand of the warrant was a nullity, as the notice required its production within three days, whereas the 24 Geo. 2, c. 44, s. 6, allows six days to comply with the demand.

Under 24 Geo. 2, c. 44, the demand of warrant need not state any time.

Parke, B.—I was always of opinion that there was nothing in that objection. The act says, that demand shall be made in writing for the production of the warrant, and that the constable shall have six days to comply with it. Six days must then elapse before any action can be commenced; but it is not necessary that the demand should specify any time. The mention, therefore, of three days in the demand cannot vitiate it.

(*b*) TO INDICTMENTS*.

(*c*) TO BE REMOVED†.

X. RELATIVE TO PLEADINGS CONNECTED WITH‡.

XI. RELATIVE TO THE EVIDENCE CONNECTED WITH §.

* A constable may be indicted for a neglect of duty. (*Rex* v. *Wiat*, E. T. 1705, K. B. 11 Mod. 54; S. C. 1 Salk. 380; S. C. 2 Lord Raym. 1189; Fortesc. 127).

† High and petty constables are removable. (*Rex* v. *White*, E. T. 1705, K. B., 1 Salk. 150). But the sessions cannot discharge constables appointed by the leet; (*The Constables of Limington's case*, E. T. 1728, K. B., 2 Stra. 798); nor can they appoint others, unless the leet neglects. (*Rex* v. *Lashmere*, T. T. 1727, K. B., 11 Mod. Rep. 380).

‡ Although a constable has exceeded his authority, he is within the 21 Jac. 1, c. 12; and, therefore, entitled to an acquittal, unless the venue be laid in the proper county. (*Straight* v. *Gee*, M. T. 1818, K. B., N. P., 2 Stark. 445). And he may as such justify under the general issue; though if he be a private individual acting in aid of a constable, a different rule obtains. (*M'Clougham* v. *Clayton*, Lan. Ass. 1816, K. B., Holt, N. P. 478).

§ The wardmote book of the city of London is the best evidence of the appointment of a deputy constable. (*Underhill* v. *Witts*, M. T. 1799, K. B., 3 Esp. 56). The regular proof of a person being a constable is by the production and proof of his appointment and swearing at the court leet, or by justice of peace. (See 13 & 14 Car. 2, c. 12, s. 15; 2 Hawk. P. C. c. 10, s. 137; Stra. 1149; 1 Bac. Abr. 439). And it has been holden, on a trial for murder, that proof that a party acted as constable, is evidence to prove that he is one. (See 2 Leach, C. L. 581; 4 T. R. 366; 3 Campb. 432). Where actions had been commenced against constables for seizing goods suspected to have been stolen, and against the informer for the injury sustained, the Court would not hear evidence of special damage in the former action while the latter suit was pending. (*Price* v. *Messenger*, H. T. 1799, C. P., 3 Esp. 96; S. C. not S. P. 2 B. & P. 158).

XII. RELATIVE TO COSTS CONNECTED WITH.

MABERLY *v.* PITTERTON, H. T. 1841. Ex. 9 *D. P. C.* 234.

The 21 Jac. 1, c. 12 *, giving double costs, applies to a constable appointed under the 5 & 6 Will. 4, (Municipal Corporation Act).

AN action of assault and false imprisonment having been brought against a constable, appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, and notice of trial given, the plaintiff discontinued the action. On a rule to enter a suggestion for double costs, under the statute 21 Jac. 1, c. 12, s. 5—

Per Cur.—There are two questions in this case—first, what costs defendant is entitled to have; and secondly, whether a suggestion is necessary. The Municipal Corporation Act, under which the defendant has been appointed constable, does not deprive him of the rights he possessed under the statute of James; for, although appointed under the 5 & 6 Will. 4, c. 76, he stands in the situation of a constable at common law, and is entitled to the same protection as any other constable. As to the second point, we think a suggestion on the roll is necessary.

HUMPHREY *v.* WOODHOUSE, H. T. 1835. C. P. 3 *D. P. C.* 416; S. C. 1 *Bing. N. S.* 506; S. C. 1 *Scott*, 395.

The Judge cannot certify to deprive police officers of their costs when acquitted †.

THIS was an action of trespass and false imprisonment. Two of the defendants, Foster and Stilwell, acted upon the occasion as police officers, and they were acquitted, as there was not sufficient evidence against them. The verdict passed against the other defendants. Immediately after the trial, for the purpose of depriving the parties who were acquitted of their costs, under 8 & 9 Will. 3, c. 11, s. 1, *Tindal*, C. J., certified that there was reasonable cause

* By the 1 Jac. 1, c. 5, and 21 Jac. 1, c. 12, it is enacted, that if any action be brought against a constable for any thing done by virtue of his office, he, and also all others who in his aid, or by his command, shall do any thing concerning his office, shall, if he recover, have double costs; but it must be certified by the Judge that he was acting in the execution of his office. (*Grindley* v. *Holloway*, H. T. 1780, K. B., 1 Doug. 307).

† By 8 & 9 Will. 3, c. 11, s. 1, it is enacted, "That where several persons shall be made defendants in an action or plaint of trespass, assault, false imprisonment, or ejectio firmæ, and any one or more of them shall upon the trial be acquitted by verdict, every person so acquitted shall have and recover his costs of suit in like manner as if a verdict had been given against the plaintiff, and acquitting all the defendants, unless the Judge certify, &c., that there was reasonable cause for making them defendants."

The 10 Geo. 4, c. 44, s. 41, which, after appointing the place where, and limiting the time when, &c., the action is to be brought, enacts, for the protection of persons acting in the execution of this act, "That if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant had by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon."

By 3 & 4 Will. 4, c. 42, s. 32, it is enacted, "That where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi as to him or them, or, upon the trial of such action, shall have a verdict pass for him or them, every such person shall have judgment for,

for making them defendants in the action. On a rule, calling upon the plaintiff to shew cause why the two defendants, who had been acquitted, should not have their costs, notwithstanding the Judge's certificate—

The Court held, that a Judge at Nisi Prius has no authority under 8 & 9 Will. 3, c. 11, s. 1, or 3 & 4 Will. 4, c. 42, s. 32, to grant a certificate to deprive defendants, police officers who have been acquitted, of their right to full costs given by the Metropolitan Police Act, 10 Geo. 4, c. 44, s. 41; as the act 3 & 4 Will. 4, c. 42, only extends the operation of the prior act of 8 & 9 Will. 3, and does not control or repeal intermediate acts.

Construction. See tits. *Contract—Covenant—Deed.*

Consul. See 6 *Peters. Abr.* 151.

Contempt.

I. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PERSON AND GOVERNMENT, p. 20.

II. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PREROGATIVE, p. 20.

III. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S TITLE, p. 21.

IV. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PALACE, p. 21.

V. RELATIVE TO CONTEMPTS AGAINST COURTS OF JUSTICE.

(*a*) As to process.

1. *By destroying of,* p. 21.
2. *Speaking contemptuously,* p. 21.
3. *Not complying with Orders and Rules of Court,* p. 21.
4. *For not obeying Writs of Habeas Corpus,* p. 23.
5. *By instituting Fictitious Suits,* p. 23.

and recover his reasonable costs, unless, in the case of a trial, the Judge before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in the action."

(*b*) As to Individuals.

1. *Attornies.* See tit. *Attornies.*
2. *Gaolers.* See tit. *Prisoner.*
3. *Persons who prevent the Execution of Process.* See tit. *Process.*
4. *Persons who disobey Process.* See tit. *Process.*
5. *Sheriffs.* See tit. *Sheriff.*
6. *Witnesses.* See tit. *Witness.*

VI. RELATIVE TO THE ARREST OF PERSONS IN, p. 23.

VII. RELATIVE TO BAIL ON, p. 24.

VIII. RELATIVE TO THE RIGHTS OF PERSONS IN, p. 24.

IX. RELATIVE TO THE DISCHARGE OF PERSONS IN, p. 24.

X. RELATIVE TO THE PUNISHMENT, p. 24.

I. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PERSON AND GOVERNMENT*.

II. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PREROGATIVE†.

* All contempts against the King's person or government are highly criminal, and punishable with fine and imprisonment: as, by endeavouring to frighten the King into a change of his measures with threats of the uneasiness of his subjects; or by subscribing a petition to him, in which it is intimated that if it be denied many thousands will be discontented, &c.; (see Cro. Jac. 37; Moor, 756; Noy, 101); or by spreading false rumours concerning the King's intentions, as that he designs to grant a toleration to the papists, &c.; (Cro. Jac. 38); or speaking contemptuously of him, as by warning him, &c., or giving out that he wants wisdom, valour, or steadiness; or in general doing any thing which may lessen him in the esteem of his subjects, and weaken his government, or raise jealousies between him and his people. (See Cro. Car. 117). So, doing an act which impliedly encourages rebellion: as, by absolving at the gallows those who, being condemned for high treason, shew no signs of repentance, but persist in justifying the fact; or by drinking to the pious memory of a person executed for high treason. (1 Cro. Jac. 37, Moor. 756; Noy, 101).

† Contempts against the King's prerogative are of so various a nature, that they cannot well be reduced to certain heads; however, the principal of them seem to come under the following divisions: 1st, refusing to assist the King, for the good of the public; 2nd, preferring the interests of a foreign state to that of our own; and lastly, disobeying the King's lawful commands or prohibitions. As to the first, it is a high contempt for any subject to deny the King that assistance for the good of the public, either in his councils or by wars, which by the law he is bound to give: as, for a peer not to come to the Parliament at the day of summons; (see Moor, 978; Noy, 102); or to depart this realm without the King's license. (See Staunf. P. C. 38). Secondly, it is a high contempt to prefer the interest of a foreign state to that of our own: it is criminal to do any thing which may but incline a man so to do; as, to receive a person from a foreign prince without the leave of our King. (See Hawk, P. C., c. 18, s. 10). And lastly, it is also a contempt to disobey the King's lawful commands or prohibitions: as, by obstinately refusing obedience to his writs; or contemning a summons from his council to appear before them; or not answering such questions in relation to a matter wherein the interest of the state is concerned, as shall be proposed by the

III. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S TITLE*.

IV. RELATIVE TO CONTEMPTS AGAINST THE QUEEN'S PALACE†.

V. RELATIVE TO CONTEMPTS AGAINST COURTS OF JUSTICE.

(*a*) As to process.

1. *By destroying of*‡.

2. *Speaking contemptuously*§.

---

3. *Not complying with Orders and Rules of Court*‖.

Clare *v.* Blakesley, T. T. 1840. C. P. 1 *Scott, N. P.* 397; S. C. 1 *M. & G.* 567; S. C. 8 *D. P. C.* 835.

It is no contempt, if parties obey an order of N. P. as far as they are able.

In an action for a libel contained in the recitals of a deed of settlement of a joint-stock company, it was agreed that the defendant should cancel the deed containing the offensive expressions and prepare a new deed; and the terms of the agreement were embodied in an order of Nisi Prius, which was subsequently made a rule of Court. A motion was made for a rule, calling upon the defendants to shew cause why an attachment should not issue against them for a contempt in not having obeyed the rule, an affidavit being produced that the whole deed was still in existence. In answer it was shewn, that the old deed still continued in existence in consequence only of the inability of the defendants to procure the new one. Every exertion had been employed to secure this object, but without effect.

Per Cur.—The compact entered into by the defendants has been executed by them, so far as has been possible, but they have not been able to carry the terms of the order into full effect. The de-

privy council; or refusing to give evidence to a grand jury concerning a crime. (See Salk. 278; Dyer, 176; Moor, 109; 3 Inst. 179; F. N. B. 85; 1 Cha. Ca. 116).

* Contempts against the King's title are of two kinds: 1st, denying his title; 2nd, refusing to take the oaths required by law for the support of his government. As to the first point, it is highly criminal to deny the King's title, and punishable with fine and imprisonment, such as the Court shall think proper, according to the heinousness of the crime and the circumstances of the parties: as, if a man in writing or discourse shall maintain that the King is an usurper; or that another has a better title to the crown, &c. (See Yelv. 107; 2 Roll. 90; Palm. 424). And as to the second point, it is a high contempt to refuse to take the oaths required by law in support of the government. (See Finch, 141; 2 Inst. 73; 1 Hale, P. C. 64; 2 Keb. 314; 1 Geo. 1, stat. 2, c. 13).

† Committing an assault in the King's palace is a contempt. (*Earl of Devonshire's case*, 1687, 11 State Trials, 133).

‡ An attachment cannot be obtained for contempt in tearing process after service; (*Myers* v. *Wills*, 4 Moore, 147); but snatching up a warrant of attorney and tearing off the seal is a contempt. (*Anon.*, Vent. Rep. 3).

§ Cursing the Chief Justice and Court, (*Wreeks* v. *Robbins*, T. T. 1788, C. B., Ca. Prac. 132), or process, is a contempt. (*Rex* v. *Unitt*, T. T. 1724, K. B., 1 Stra. 567: S. P. *Queen* v. *Cross*, M. T. 1702, K. B., 6 Mod. 43).

‖ Delivering a particular of demand as general as the declaration, is a contempt. (*Brown* v. *Watts*, T. T. 1808; C. P. 1 Taunt. 353).

fendants have honestly done all that they could do to obey the order, and they have not wilfully done any thing to affect or offend the plaintiff. We do not think that there is any sufficient ground shewn for issuing an attachment.

BAKER *v.* RYE, H. T. 1833. Ex. 1 *D. P. C.* 689.

An attachment for disobeying a Judge's order does not lie until it has been made a rule of Court.

VAUGHAN, B., had made an order in this case, that the defendant should be at liberty to amend the issue and plea of set-off, upon payment of costs by the defendant's attornies, which order was acted upon by the defendant's attornies making the amendment. On an affidavit of personal service of a copy of the order of the Master's allocatur shewing the original order and allocatur, and a demand and refusal of the costs, an attachment had been granted against the attornies.

The Court being clearly of opinion that the attachment was irregular, as the Judge's order had never been made a rule of Court, made the rule absolute, directing the costs of the amendment to be set off against the costs of the rule.

LEVY *v.* DUNCOMBE, H. T. 1835. Ex. 3 *D. P. C.* 447; S. C. 1 *C., M. & R.* 737.

The rule must be personally served or waived by appearance.

THE party against whom a rule nisi for an attachment was obtained appeared, and objected that the rule nisi had not been personally served.

Per Cur.—If the party appears as he does here, by his counsel, that obviates the necessity of inquiring whether the service of the rule nisi was personal or not.

GREENWOOD *v.* DYER, M. T. 1836. K. B. 5 *D. P. C.* 255.

But serving the rule of Court without the order is sufficient.

ON an attachment it appeared that the order was never personally served, but was afterwards made a rule of Court. The rule was personally served; but it was objected, that the order had *not* been served—

Littledale, J.—The fact of the order not having been served is immaterial, as the foundation of the contempt is the disobedience to the rule of court.

HINCHLIFFE *v.* JONES, T. T. 1835. K. B. 4 *D. P. C.* 86.

In K. B. order may be made a rule of Court, and the attachment embodied in the same motion.

ON motion for an attachment for not obeying a Judge's order, the case of *Howel* v. *Bulteel*, 3 D. P. C. 99, was relied on for the purpose of shewing that the attachment might be obtained without making the order a rule of Court.

Coleridge, J.—That case only decided, that the application to make the Judge's order a rule of Court, and for an attachment, might be made on one motion. I have no jurisdiction to grant an attachment.

PILCHER *v.* WOODS, M. T. 1835. C. P. 4 *D. P. C.* 329.

Aliter in C. P.

ON motion to make a Judge's order a rule of Court, and for an attachment for a contempt, it was suggested, that in the other Courts but one motion was required for both purposes. (*Hinchliffe* v. *Jones*, 4 D. P. C. 86, supra; *Howell* v. *Bulteel*, 3 D. P. C. 99).

Per Cur.—In the C. P. two motions are necessary to make a Judge's order a rule of Court, and for an attachment for disobedience thereto.

4. *For not obeying Writs of Habeas Corpus.*

STOCKDALE *v.* HANSARD, E. T. 1840. K. B. 8 *D. P. C.* 474.

The serjeant-at-arms is not in contempt for not making a return to a habeas corpus served the preceding day;

ON motion for an attachment against the serjeant-at-arms for not making a return to the writ of habeas corpus, issued from this Court, and commanding him to have the bodies of William Evans, Esq., and John Wheelton, Esq., sheriffs, before the Court; it appeared that he was served on the preceding night.

Per Cur.—There is no sufficient ground at present for this application: we cannot suppose that no return will be made.

WYATT, *Ex parte*, H. T. 1836. K. B. 5 *D. P. C.* 389.

and where a writ of habeas was served on A. in France, and the subject of the habeas was in France, but A. was then in England, the Court refused a warrant to apprehend him for a contempt, under the 56 Geo. 3, c. 100.

ON motion for an attachment against a person named Colonel Rochfort, for his disobedience to a writ of habeas corpus which had been directed to him, and which had been served on him in France; it appeared that the colonel had eloped with the applicant's wife, had taken her into France, and was now living with her there in a state of open adultery. With the wife he had taken the son of the applicant, and had for a long time past kept him from his father. An application had been made previous to this service to the French authorities, and the writ of habeas corpus had been recognised, and declared proper to be executed. The reason of the application being made for a rule absolute in the first instance was, that the defendant was now a prisoner for debt in the Marshalsea of this Court, and was making extraordinary efforts to arrange his debts with his creditors, and obtain his liberation and return to France.

The Court will not grant a rule absolute in the first instance for an attachment, on the ground of his disobedience; nor will the Court grant its warrant to apprehend the defendant for his contempt under the 56 Geo. 3, c. 100, s. 2, it appearing that the person in question was confined in France. That act only applies, as appears by the language of the first section, to persons confined or restrained of their liberty within England, Wales, Berwick-upon-Tweed, Jersey, Guernsey, Man, and Ireland.

5. *By instituting Fictitious Suits*.*

VI. RELATIVE TO THE ARREST OF PERSONS IN†.

* Prosecuting an action, not to determine a right or controversy, but to deceive the Court and raise a prejudice against a third person, is a contempt. (*Coxe* v. *Phillips*, E. T. 1737, K. B., Ca. temp. Hard. 237; S. C. 3 Hawk. P. C. 229).

† A party in contempt cannot be arrested on a verbal order; (*Furlong* v. *Bray*, T. T. 1669, K. B., 2 Saund. 182); and a party in custody for a contempt in preventing the service of an order on another, who escapes, cannot be taken on an escape warrant. (*Hinchcliffe* v. *Payne*, T. T. 1719, K. B., 1 Stra. 99).

GOOD *v.* WILKS, E. T. 1819. K. B. 6 *M. & S.* 413.

A party in contempt permitted to be at large may be re-taken on an alias attachment.

A PARTY taken under an attachment for non-payment of money pursuant to a rule of Court had been permitted to go at large upon conditions which he failed to comply with—

The Court held, that an alias attachment might be issued, being different from a writ of execution, the former writ being not only to procure satisfaction to the party, but also to satisfy the Court for the contempt.

VII. RELATIVE TO BAIL ON*.

VIII. RELATIVE TO THE RIGHTS OF PERSONS IN†.

IX. RELATIVE TO THE DISCHARGE OF PERSONS IN‡.

REX *v.* MORLEY, T. T. 1836. K. B. 4 *Ad. & E.* 849.

The Master's report that the party has cleared himself from the contempt is in general conclusive.

ON attachment for a contempt, where the defendant has been examined on interrogatories, and the Master of the crown-office directed to report thereon to the Court, if he reports that the defendant has cleared himself of the contempt, the Court will not enter into a discussion of the correctness of such report, unless it appear by the interrogatories and answers, (semble, not by affidavit), that the Master has been mistaken. It is not sufficient ground for a review, that the Master's report appears contradictory to the opinion of a Judge who granted the attachment.

X. RELATIVE TO THE PUNISHMENT§.

* The Court would not bail a person committed for contempt, although the prosecutor consented. (*Fanell's case*, M. T. 1772, K. B., Andrews, 299).

† A prisoner in custody for contempt cannot be charged with a declaration without leave of the court, (*Allgood* v. *Howard*, E. T. 1726, C. P., Ca. Prac. 27), unless he accepts the declaration, and suffers the plaintiff to take judgment. (*Pepper* v. *Bawden*, M. T. 1728, C. P., Ca. Prac. 31).

‡ A contempt may be rebutted by positive contradiction on oath. (*The King* v. *Sims*, E. T. 1700, K. B., 12 Mod. 511). By 13 Car. 2, st. 2, c. 2, s. 4, persons taken upon an attachment for contempt, not to be discharged without a lawful supersedeas. And an attachment, after a decree for dismission, is in nature of an execution at law; and a general pardon seems to extend to the contempt, but not the debt. (See Fin. Rep. 253). So, upon a motion for a serjeant-at-arms, on a commission of rebellion returned, the Court held, by the King's demise all process of contempt not executed is determined. (See Vern. 300; Maddox's Equity, 201).

§ Parties in contempt are punished by fine or imprisonment, according to the discretion of the Court. (See 2 Hawk. P. C. 22, s. 1; 4 Blac. Com. 284; Br. Contempts, pl. 2; 44 E. 324; 2 Bulst. 68; Style, 211; 3 Ch. Rep. 23.

Contingent Damages. See tit. *Damages.*

Contingent Estate. See tit. *Estate.*

Contingent Remainder. See tit. *Remainder.*

Contingent Uses. See tit. *Uses.*

Continuances*. See also tit. *Trial.*

Contract.

See tits.

Fixtures,
Fraud, Statute of,
Guarantee,
Insurance,
Landlord and Tenant,
Lease,
Tender,
Vendor and Purchaser,
Warranty.

I. RELATIVE TO THE CREATION OF.

(*a*) As to being parol or written.

1. *In general,* p. 35.
2. *When express,* p. 35.
3. *When implied,* p. 35.

(*b*) As to being specialties, or contracts under seal, p. 36.

(*c*) As to records, p. 36.

II. RELATIVE TO THE FORM OF CONTRACTS.

(*a*) No particular form necessary, p. 36.

(*b*) Should be clear and explicit, p. 36.

III. RELATIVE TO THE STAMP.

(*a*) On contracts in general.

1. *As to Contracts within the Stamp Acts,* p. 36.
2. *As to Instruments not within the Stamp Acts,* p. 37.

* By Rule, H. T., 2 Will. 4, after judgment by default, the entry of any subsequent continuances shall not be required. And by Rule, H. T., 4 Will. 4, no entry of continuances by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or on pleadings, except the jurata ponitur in respectu, which is to be retained.

III. RELATIVE TO THE STAMP—(*continued*).

3. *As to Instruments containing several separate and distinct Contracts*, p. 37.
4. *As to Instruments containing different Agreements with several Persons*, p. 37.
5. *As to the Time of Stamping*, p. 38.
6. *As to compelling Parties to produce a Contract to be stamped*, p. 38.

(*b*) On particular contracts.

1. *As to Annuities.* See tit. *Annuity.*
2. *As to Appraisements.* See tit. *Appraisement.*
3. *Connected with Apprentices.* See tit. *Apprentice.*
4. *As to Attornies.* See tit. *Attorney.*
5. *As to Arbitration Contracts.* See tit. *Arbitration.*
6. *As to Bail Bonds.* See tit. *Bail.*
7. *As to Bills of Lading.* See tit. *Lading, Bills of.*
8. *As to Bills and Notes.* See tit. *Bills and Notes.*
9. *As to Bonds.* See tit. *Bonds.*
10. *As to Certificate.* See tit. *Attorney.*
11. *As to Charter-Parties.* See tit. *Charter-Party.*
12. *As to Cheques.* See tit. *Cheque.*
13. *As to Composition Deeds.* See tit. *Composition Deed.*
14. *As to Covenants.* See tit. *Covenant.*
15. *As to Deeds.* See tit. *Deed.*
16. *As to East India Company Contracts.* See tit. *East India Company.*
17. *As to Feoffments.* See tit. *Feoffment.*
18. *As to Frauds, Contracts connected with the Statute of.* See tit. *Frauds, Statute of.*
19. *As to Grants.* See tit. *Grant.*
20. *As to Guarantees.* See tit. *Guarantee.*
21. *As to Indemnity Bonds.* See tit. *Indemnity.*
22. *As to Insurance Policy Contracts.* See tit. *Insurance, Policy of.*
23. *As to Leases.* See tit. *Lease.*
24. *As to Marriage Contracts.* See tit. *Marriage.*
25. *As to Mortgages.* See tit. *Mortgage.*
26. *As to natural Love and Affection, Instrument relating to.* See tits. *Bond, Stamps.*
27. *As to Offices, Contracts relating to the Sale of.* See tit. *Office.*

III. RELATIVE TO THE STAMP—(*continued*).

28. *As to Partners and Partnership Contracts.* See tit. *Partners and Partnership.*
29. *As to Receipts.* See tit. *Receipts.*
30. *As to Ship and Shipping.* See tit. *Ship and Shipping.*
31. *As to Warranties.* See tit. *Warranty.*

IV. RELATIVE TO THE PARTIES WHO MAY CONTRACT.

(*a*) In general, p. 39.

(*b*) As to particular individuals.

1. *Agents.* See tit. *Principal and Agent.*
2. *Aliens.* See tit. *Alien.*
3. *Assignees.* See tits. *Bankrupt—Bond—Covenant—Debtor and Creditor—Deed—Insolvent Debtors — Lease — Remainder — Reversion — Way, Right of.*
4. *Auctioneers.* See tit. *Auction and Auctioneer.*
5. *Bankrupts.* See tit. *Bankrupt.*
6. *Bastards.* See tit. *Bastard.*
7. *Brokers.* See tit. *Principal and Agent.*
8. *Churchwardens.* See tit. *Churchwardens.*
9. *Clergymen.* See tit. *Ecclesiastical Persons.*
10. *Commissioners.* See tits. *Bankrupt—Canal—Inclosure—Insolvent Debtors—Lunatic.*
11. *Duress, Persons under.* See tit. *Duress.*
12. *Executors and Administrators.* See tit. *Executor and Administrator.*
13. *Feme Coverts.* See tit. *Husband and Wife.*
14. *Gamblers.* See tit. *Gaming.*
15. *Government Agents.* See tit. *Government Contracts.*
16. *Husband and Wife.* See tit. *Husband and Wife.*
17. *Idiots.* See tit. *Idiots.*
18. *Infants.* See tit. *Infant.*
19. *Lunatics.* See tit. *Lunatics.*
20. *Married Women.* See tit. *Husband and Wife.*
21. *Outlaws.* See tit. *Outlawry.*
22. *Overseers.* See tit. *Overseers.*
23. *Partners.* See tit. *Partners and Partnership.*
24. *Servants.* See tits. *Master and Servant—Principal and Agent.*
25. *Stock-Brokers.* See tits. *Principal and Agent—Stock-Jobbing.*
26. *Trustees.* See tit. *Trustees.*

V. RELATIVE TO THE CONSIDERATION.

(*a*) What a sufficient consideration to support a contract.

1. *In general,* p. 40.
2. *By Compounding,* p. 44.
3. *By abstaining from proving a Legal Debt, or executing an Instrument in favour of a particular Creditor,* p. 44.
4. *To pay in default of Marriage,* p. 44.
5. *To pay on account of natural Love and Affection,* p. 44.

(*b*) When illegal.

1. *At common Law.*
   1.—*In general,* p. 44.
   2.—*On account of Cohabitation and Prostitution.* And see tits. *Board and Lodging—Bond—Prostitution—Use and Occupation.*
   3.—*On account of Fraud.* See tit. *Fraud.*
   4.—*On account of being a Time Bargain.* See tit. *Gaming—Stock-Jobbing.*
   5.—*On account of Immorality.* See tit. *Prints.*
   6.—*On account of Promises made with Sheriff.* See tit. *Arrest—Bail—Sheriff.*
   7.—*On account of affecting the Course of Justice.* See tit. *Compounding.*
   8.—*On account of being in restraint of Marriage.* See tit. *Marriage.*
   9.—*On account of trading with an Enemy.* See tits. *Alien—Trade and Trading.*
2. *By Statute.*
   1.—*In general,* p. 44.
   2.—*On account of Bankrupt paying Creditors for signing his Certificate.* See tit. *Bankrupt.*
   3.—*On account of Bribery.* See tit. *Bribery.*
   4.—*On account of Forestalling, Regrating, &c.* See tits. *Forestalling—Regrating.*
   5.—*On account of Gaming.* See tit. *Gaming.*
   6.—*Relating to Liquors.* See tit. *Spirituous Liquors.*
   7.—*Relating to the Lord's Day.* See tits. *Frauds, Statute of—Sunday.*
   8.—*Relating to Lotteries.* See tit. *Lottery.*
   9.—*Relating to Offices, Sale of.* See tit. *Offices, Sale of.*

V.—RELATIVE TO THE CONSIDERATION—(*continued*).

10.—*Relating to Sheriffs.* See tit. *Sheriffs.*

11.—*On account of Simony.* See tit. *Simony.*

12.—*On account of Smuggling.* See tit. *Smuggling.*

13.—*On account of Stock-Jobbing.* See tit. *Stock-Jobbing.*

14.—*On account of Trading to the East Indies.* See tit. *East-India Company.*

15.—*On account of Treating at Elections.* See tit. *Election.*

16.—*On account of Usury.* See tit. *Usury.*

17.—*On account of Wagers.* See tit. *Wager.*

(*c*) As to executed considerations, p. 44.

VI. RELATIVE TO THE SUBJECT-MATTER OF THE CONTRACT.

(*a*) As relates to property.

1. *Real Property.* See tits.

Covenant,
Fixtures,
Frauds, Statute of,
Grant,
Heir,
Inclosures,
Landlord and Tenant,
Lease,
Power,
Release,
Rent,
Repairs,
Replevin,
Taxes,
Use and Occupation.

(*b*) Personal Property. See tits.

Accounting, Action for not,
Account stated,
Action,
Apothecary,
Apprentice,
Attorney,
Auction and Auctioneer,
Bail,
Bailment,
Banker,
Bank of England,
Bankrupt,
Barrister,
Bastard,
Bills and Notes,
Bottomry and Respondentia Bond,
Canal,
Carrier,
Cheque,
Chose in Action,
Churchwarden,
Composition with Creditors,
Contribution,
Copyright,
Corporation,
Debtor and Creditor,
Deceit,
Demurrage,
Deposit,
Distress,
Ecclesiastical Persons,
Election,
Escape,
Exchange,
Executor and Administrator,
Fixtures,
Forbearance,
Frauds, Statute of,
Freight,
Gift,
Goods bargained and sold,
Goods sold and delivered,
Guarantee,
Herald,
Husband and Wife,

VI.—RELATIVE TO THE SUBJECT-MATTER OF THE CONTRACT—(*continued*).

Indemnity,
Infant,
Innkeeper,
Insolvent Debtor,
Insurance,
Interest,
Joint-Stock Company,
Judgments,
Landlord and Tenant,
Legacy,
Lien,
Maintenance,
Marriage, Promise of,
Master and Servant,
Money had and received,
Money lent and advanced,
Money paid,
Mortgage,
Officer,
Overseer,
Pardon,
Parent and Children,
Partner,
Party-wall,
Physician,
Poundage,
Principal and Agent,
Principal and Surety,
Printer,
Prize,
Proctor,
Property Tax,
Prostitution,
Receiver-General,
Reward,
Salvage,
Scotch Bond,
Sheriff,
Ship and Shipping,
Simony,
Smuggling,
Spirituous Liquors,
Stamp,
Stipulated Damages,
Stocks,
Surveyor,
Sutlers,
Theatres,
Tithes,
Tolls,
Trustees,
Use and Occupation,
Usury,
Wager,
Work and Labour,
Witness,
Warranty,
Waste.

(*c*) As relates to services.

1. *In general,* p. 45.
2. *By particular Individuals.*

1.—*Agents.* See tit. *Principal and Agent.*

2.—*Apothecaries.* See tit. *Apothecary.*

3.—*Apprentices.* See tits. *Apprentice—Master and Servant.*

4.—*Arbitrators.* See tit. *Arbitration.*

5.—*Attorneys.* See tit. *Attorney.*

6.—*Auctioneers.* See tit. *Auction and Auctioneer.*

7.—*Bail.* See tit. *Bail.*

8.—*Broker.* See tit. *Principal and Agent.*

9.—*Carrier.* See tit. *Carrier.*

10.—*Counsel.* See tit. *Barristers.*

11.—*Executors and Administrators.* See tit. *Executor and Administrator.*

12.—*Factor.* See tit. *Principal and Agent.*

13.—*Guarantees.* See tit. *Guarantee.*

VI.—RELATIVE TO THE SUBJECT-MATTER OF THE CONTRACT—(*continued*).

14.—*Husband and Wife.* See tit. *Husband and Wife.*

15.—*Infants.* See tit. *Infant.*

16.—*Mechanics.* See tit. *Work and Labour.*

17.—*Messengers and Commissioners of Bankrupt.* See tit. *Bankrupt.*

18.—*Parish Officers.* See tits. *Churchwardens—Overseers—Parish Officers.*

19.—*Partners.* See tit. *Partners and Partnership.*

20.—*Physicians.* See tit. *Physicians.*

21.—*Printers.* See tit. *Printers.*

22.—*Proctors.* See tit. *Proctors.*

23.—*Prostitutes.* See tits. *Board and Lodging—Prostitution.*

24.—*Servants.* See tits. *Master and Servant—Principal and Agent.*

25.—*Sheriffs.* See tit. *Sheriff.*

26.—*Sureties.* See tits. *Bail—Bond—Covenant—Bills and Notes—Guarantees—Principal and Surety.*

27.—*Surveyors.* See tit. *Surveyor.*

28.—*Wharfinger.* See tits. *Carrier—Wharfinger.*

29.—*Witnesses.* See tit. *Witness.*

VII. RELATIVE TO THE MUTUALITY IN THE CONTRACT, p. 45.

VIII. RELATIVE TO THE CONSTRUCTION OF THE CONTRACT.

(*a*) WITH REFERENCE TO CONTRACTS MADE IN ENGLAND, p. 46.

(*b*) WITH REFERENCE TO CONTRACTS MADE ABROAD, p. 53.

IX. RELATIVE TO ALTERATIONS IN CONTRACTS, AND EFFECT OF OTHER CONTRACTS CONTROLLING, p. 54.

X. RELATIVE TO THE ADOPTION OF THE CONTRACT, p. 55.

XI. RELATIVE TO THE TRANSFER OF CONTRACTS, p. 55.

XII. RELATIVE TO THE APPORTIONMENT OF CONTRACTS WHERE PART IS ILLEGAL, p. 55.

XIII. RELATIVE TO RESCINDING OR EXTINGUISHING CONTRACTS, p. 55.

XIV. RELATIVE TO THE PERFORMANCE OF CONTRACTS, p. 57.

XV. RELATIVE TO THE REVIVAL OF CONTRACTS, p. 59.

XVI. RELATIVE TO THE EXCUSE FOR NON-PERFORMANCE OF THE CONTRACT.

(*a*) On account of the act of god, p. 59.

(*b*) On account of an act of law, p. 59.

(*c*) On account of an act of party, p. 60.

(*d*) On account of an act of a stranger, p. 60.

(*e*) On account of legal ignorance, p. 60.

(*f*) On account of misrepresentation, p. 60.

(*g*) On account of being impossible, p. 61.

(*h*) On account of being made on a sunday, p. 61.

(*i*) On account of performance being illegal, p. 62.

(*j*) On account of insanity, p. 62.

(*k*) On account of an accident, p. 62.

XVII. RELATIVE TO THE FORM OF ACTIONS ON CONTRACTS.

(*a*) Special assumpsit, p. 63.

(*b*) Indebitatus assumpsit, p. 63.

XVIII. RELATIVE TO THE PARTIES TO THE ACTIONS ON CONTRACTS, p. 64. See also tits.

Alien,
Apprentice,
Auction and Auctioneer,
Bailment,
Bankrupt,
Bills of Exchange and Promissory Notes,
Carrier,
Charter-Party,
Churchwarden,
Copyhold,
Copyright,
Corporation,
Demurrage,
Executor and Administrator,
Freight,
Husband and Wife,
Infant,
Insolvent Debtor,
Insurance,
Landlord and Tenant,
Lunatic,
Mortgage,
Overseer,
Parent and Child,
Partner and Partnership,
Party-Wall,
Principal and Agent,
Principal and Surety,
Salvage,
Sheriff,
Ship and Shipping,
Taxes,
Trustee,
Use and Occupation.

XIX. RELATIVE TO THE HOLDING TO BAIL IN ACTIONS ON, p. 64.

XX. RELATIVE TO THE DECLARATION.

(*a*) TITLE OF THE COURT, p. 65.

(*b*) VENUE, p. 65.

(*c*) DAY IN, p. 65.

(*d*) GENERAL REQUISITES.

1. *In Special Assumpsit.* See tits.

Bills of Exchange,
Executor and Administrator,
Forbearance,
Freight,
Landlord and Tenant,
Marriage, Promise of,
Money had and received,
Poundage,
Work and Labour.

(*e*) OF THE INDUCEMENT, p. 65.

(*f*) OF THE MODE OF STATING THE CONTRACT, p. 65.

(*g*) OF THE MODE OF STATING THE CONSIDERATION, p. 67. See also tits.

Bills and Notes,
Executor and Administrator,
Forbearance,
Heir,
Landlord and Tenant,
Rent,
Use and Occupation.

(*h*) MODE OF STATING THE PROMISE, p. 68.

(*i*) MODE OF ALLEGING PERFORMANCE, p. 69. See also tits.

Bail,
Bills and Notes,
Forbearance,
Guarantie,
Landlord and Tenant.
Lease,
Marriage,
Principal and Surety,
Stock.

(*j*) NOTICE, p. 70.

(*k*) REQUEST, p. 70.

(*l*) BREACH, p. 71.

(*m*) DAMAGES, p. 72.

(*n*) AMENDMENT OF, p. 73.

2. *In an Indebitatus Assumpsit.*

(*a*) HOW CONSIDERATION TO BE STATED, p. 73.

(*b*) MUST SHOW A CAUSE OF ACTION, p. 73.

(*c*) MUST ALLEGE A REQUEST, p. 73.

(*d*) MUST ALLEGE A PROMISE, p. 73.

(*e*) HOW A PROMISE IS TO BE STATED, p. 74.

(*f*) IN PARTICULAR ACTIONS. See tits.

Bankrupt,
Copyhold,
Exchange,
Executor and Administrator,

XX. RELATIVE TO THE DECLARATION—(*continued*).

Goods bargained and sold,
Goods sold and delivered,
Insurance,
Interest,
Judgment,
Money had and received,
Money lent,
Money paid,
Rent,
Surgeon,
Tithes,
Tolls,
Use and Occupation,
Wages,
Work and Labour.

XXI. RELATIVE TO THE PLEAS.

(*a*) IN DENIAL.

1. *General Issue*, p. 74.

(*b*) IN CONFESSION.

1. *As to part, not shewing to what part it applies*, p. 75.
2. *Payment of Money into Court*, p. 75.

(*c*) IN AVOIDANCE.

1. *By common Law*, p. 76. See also tits.

Alien Enemy,
Baron and Feme,
Duress,
Frauds, Statute of,
Infant,
Intoxication,
Lunatic,
Non-joinder.

2. *By Statute*, p. 78. See also tits. *Frauds, Statute of—Gaming—Usury.*

(*d*) IN EXCUSE OF PERFORMANCE. See tits. *Set-off—Tender.*

(*e*) IN DISCHARGE.

1. *By Common Law.* See tits.

Accord and Satisfaction,
Account stated,
Alien,
Arbitration,
Attainder,
Composition with Creditors,
Foreign Attachment,
Judgment recovered,
Outlawry.

2. *By Statute.* See also tits.

Bankrupt,
Insolvent Debtors,
Limitations, Statute of,
Request, Court of,
Set-off.

(*f*) BY AND AGAINST EXECUTORS AND ADMINISTRATORS. See tit. *Executor and Administrator.*

(*g*) REPLICATIONS, REJOINDERS, &c., p. 78.

XXII. RELATIVE TO THE EVIDENCE.

(*a*) IN GENERAL, p. 78.

(*b*) IN PARTICULAR INSTANCES. See tits.

XXII. RELATIVE TO THE EVIDENCE—(*continued*).

Account stated,
Arbitration,
Attorney,
Bills and Notes,
Goods bargained and sold,
Goods sold and delivered,
Insurance,
Money had and received,
Money lent,
Money paid,
Non Assumpsit,
Stamp,
Use and Occupation,
Variance,
Vendor and Purchaser,
Warranty,
Witness.

XXIII. RELATIVE TO INSPECTION OF THE CONTRACT, p. 82.

XXIV. RELATIVE TO STAYING PROCEEDINGS, p. 82.

XXV. RELATIVE TO A VIEW IN ACTIONS ON CONTRACTS, p. 82.

XXVI. RELATIVE TO WHO TO BEGIN IN ACTIONS ON CONTRACTS, p. 82.

XXVII. RELATIVE TO THE DAMAGES, p. 83.

XXVIII. RELATIVE TO THE JUDGMENT AND COSTS, p. 84.

I. RELATIVE TO THE CREATION OF CONTRACTS*.

(*a*) As to being parol or written.

1. *In general*†.

2. *When express*‡.

3. *When implied*§.

* A contract is defined to be an agreement entered into by several persons, whereby one becomes bound to another to perform or abstain from doing a particular thing. The contract is either verbal or written. To constitute a parol contract five things must concur: 1st, persons eligible to contract; 2nd, persons competent to be contracted with; 3rd, a valuable consideration; 4th, an article to be contracted for; and lastly, a mutuality in the parties contracting. When written, another requisite is essential,—a stamp. And written contracts are either *not* under seal, or *under* seal; the former of which is now principally proposed for our consideration; and as to the latter, see tits. *Arbitration, Bail, Bond, Covenant, Deed, Replevin.*

† No implied contract can be created where there is an express agreement. (*Cutter* v. *Powell*, T. T. 1795, K. B., 6 T. R. 320). An offer by letter to contract becomes irrevocable the moment the other party accedes to the request by sending off his answer, and it need not reach the former to render it binding on both individuals. (*Adams* v. *Lindrell*, T. T. 1818, K. B., 1 B. & A. 681).

‡ Express and implied contracts are matters of evidence. (*Seward* v. *Baker*, H. T. 1787, K. B., 1 T. R. 616; S. P. *Webb* v. *Geddes*, E. T. 1809, C. P., 1 Taunt. 540). Hence, an express contract is where the terms of the agreement are distinctly stated. (*Dutton* v. *Poole*, M. T. 1676, K. B., 2 Lev. 211). And even if they do not distinctly appear they may be supplied by intendment; (*Anon.*, M. T. 1661, K. B., 1 Lev. 88); provided the agreement be not altogether uncertain. *Please* v. *Palfrey*, T. T. 1664, K. B., 1 Sid. 270).

§ Implied contracts are such as are not actually made by the party, but are implied by the law. (*Toussaint* v. *Martinnant*, M. T. 1787, K. B., 2 T. R. 100). As, if a surgeon, who attends the poor of a parish, is allowed to attend casual

(*b*) As to being specialties, or contracts under seal*.

(*c*) As to records†.

II. RELATIVE TO THE FORM OF CONTRACTS.

(*a*) No particular form necessary‡.

(*b*) Should be clear and explicit§.

III. RELATIVE TO THE STAMP‖.

(*a*) On contracts in general.

1. *As to Contracts within the Stamp Acts.*

Veal *v.* Nicholls, H. T. 1833. N. P. 1 *M. & Rob.* 248.

A contract, containing the words "inventory hereunto annexed," must be stamped so as to include the inventory.

The defendant tendered in evidence an agreement having only the common agreement stamp upon it. The agreement contained 1056 words; but an inventory was annexed to the agreement, containing more than twenty-four words. The body of the agreement made mention of the inventory, and described it as "hereunto annexed."

Tindal, C. J.—The circumstance of the inventory being stamped

poor, without the intervention of the overseer, the latter shall be considered liable to remunerate him. (*Lamb* v. *Bunce*, T. T. 1815, K. B., 2 M. & S. 275). So, if a man orders goods of a tradesman, without any agreement as to price, the law implies that the vendee shall pay the vendor the real value. (See 3 Bla. Com. 445). The law also implies, that all persons who undertake a duty or office, shall perform it with integrity and skill; and if, by want of those qualities, any injury accrues to individuals, they have their remedies in damages by action. (See 3 Bla. Com. 165; and particular heads in this Abridgment). But no implied promise attaches to a parish to pay for medical assistance supplied to any of their poor by another parish. (*Atkins* v. *Barwell*, T. T. 1802, K. B., 2 East, 505).

* Contracts consist only of two species; viz. agreements under seal, or parol contracts. The former are called deeds, the latter simple contracts.

† Deeds of record are created by a previous judgment, or acknowledgment of the party before a proper official person.

‡ To constitute a contract, no precise form or set of words is required. (See 2 Bla. Com. 443).

§ An agreement or contract must be expressed in clear and explicit words.

‖ The duties imposed on contracts and agreements have been varied and altered by several statutes, the last of which, the 55 Geo. 3, c. 184, enacts that any agreement, or any minute, or any memorandum of an agreement, made in England under hand only, or made in Scotland, without any clause of registration, (and not otherwise charged in this schedule, nor expressly exempted from all duty), when the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, where the same shall not contain more than 1080 words (being the amount of fifteen common law folios or sheets, of seventy-two words each), 1*l.*; and where the same shall contain more than 1080 words, 1*l.* 15*s.*; and for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.* Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1080 words or upwards.

as an inventory cannot make any difference in the question: the point in dispute is, whether the agreement be duly stamped. If the inventory is to be considered as annexed to the agreement, then the agreement requires the additional stamp. I am of opinion that the inventory *is* to be considered as so annexed.

---

2. *As to Instruments not within the Stamp Acts*.*

3. *As to Instruments containing several separate and distinct Contracts†.*

REED *v.* DEERE, T. T. 1827. K. B. *7 B. & C.* 261.

Where an agreement is stamped, but a subsequent one is indorsed on the back which renders it of no force, that must be stamped also.

AFTER entering into an agreement of reference, additional terms were indorsed on the back, but which was not stamped; and the declaration contained counts, first, on the whole terms contained in both papers, and secondly on the original one.

The Court held, that the second agreement materially varying from the first rendered that of no force, and it could not be resorted to to sustain the second count; and that the second, being unstamped, could not be given in evidence to sustain the first count, although it might be looked at to ascertain that it related to the subject-matter.

---

4. *As to Instruments containing different Agreements with several Persons.*

LINLEY *v.* CLARKSON, H. T. 1833. Ex. 1 *C. & M.* 436.

Where parties contract to pay

ASSUMPSIT on an agreement appointing the plaintiff a committee to defend suits and actions commenced by Sir W. Pilkington and

* The 55 Geo. 3, c. 186, exempts from duties, "label, slip, or memorandum, containing the heads of insurances, to be made by the corporations of the Royal Exchange Assurance and London Assurance, or by the corporations of the Royal Exchange Assurance of houses and goods from fire, and London Assurance of houses and goods from fire."

"Memorandum, or agreement for granting a lease or tack, at rack-rent, of any messuage, land, or tenement, under the yearly value of 5*l.* But an agreement for a lease of premises, though under 5*l.* per annum, is not within this exception, if the interest agreed for be a beneficial one." (*Doe* d. *Hunter* v. *Boulcot*, 2 Esp. 596).

The statute also exempts "memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant." Hence, an agreement for an assignment of an apprentice from one master to another must be stamped, by 23 Geo. 3, c. 58, as it does not come within the exception in the statute, relative to the hiring of a servant. (*Rex* v. *The Inhabitants of St. Paul's, Bedford*, 6 T. R. 452.

So, it exempts "memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise, from port to port in Great Britain."

The 55 Geo. 3, c. 184, exempts from duties, "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandize." So, a letter written by one who manages another's trade, binding himself to pay a debt contracted therein, need not be stamped. (*Mackenzie* v. *Banks*, E. T. 1793, K. B., 5 T. R. 176). But the primary object of the letter must be a sale of goods. (*Smith* v. *Catar*, T. T. 1819, K. B., 2 B. & A. 778).

† A written contract, doubled by an indorsement, requires stamps. (*Robson* v. *Hall*, T. T. 1792, K. B., N. P., Peake, 127).

the costs of a suit ratably, the stamp must be according to the aggregate amount*.

others, owners of the Wakefield Stoke Mills, against the servants, tenants, or inhabitants of the township of Aberthorpe-cum-Thomas, in the county of York, whereby the subscribers agreed to pay to the committee their several and respective shares, parts, and proportions of all bills for fees, &c., incurred on account of defending such suits, ratably and proportionably, according to the sums of money severally subscribed by them, and set opposite to their respective names. The agreement was produced, bearing nearly 200 signatures, with different sums in figures opposite to the names. Including the defendant's signature and subscription, and all the previous signatures and sums, the agreement did not contain 1080 words; but reckoning all the signatures and sums, the words exceeded that number. It was thereupon objected that the 1*l.* stamp affixed was insufficient, because the 55 Geo. 3, c. 148, sch., pt. 1, required a 1*l.* 15*s.* stamp, as the agreement contained 1080 words. The learned Judge refused to reject the agreement as evidence, but reserved leave to move to enter a nonsuit.

Per Cur.—The parties to this agreement are bound to contribute in certain proportions. It is utterly impossible to ascertain what these proportions are, and the amount to which each of the parties is liable, and for which the plaintiffs are entitled to recover, without referring to all the names and all the sums. To see how many words the agreement contains, the signatures and sums from first to last must be read, and the agreement stamped accordingly.

---

5. *As to the Time of Stamping*†.

6. *As to compelling Parties to produce a Contract to be stamped.*

REID *v.* COLEMAN, H. T. 1834. Ex. 2 *C. & M.* 456; S. C. 2 *D. P. C.* 354.

Where there is only one contract, the plaintiff is entitled to a copy, to have it stamped;

THIS was an action by a tenant against his landlord on an agreement, of which the only copy was in possession of the defendant. The plaintiff applied to the defendant for a copy; but the defendant refused, unless the plaintiff would admit the signatures of the parties, that a sum of 91*l.* had been tendered, and consent to a reference to any one of six barristers named by the defendant. The plaintiff did not accede to these terms; but after giving a notice to the defendant, that unless he gave a copy of the agreement, he should apply to the Court, obtained a rule to shew cause why the defendant should not deliver a copy of the agreement, and produce the original at the Stamp Office, to be stamped.

Per Cur.—The defendant had no right to insist upon those terms; but a Judge at chambers would have granted the application as a matter of course. It is every day's practice to settle these matters at chambers. The costs of the application ought to be costs in the cause.

* But where several persons agree to subscribe to the construction of a dock, one stamp suffices; (*Davis* v. *Williams*, H. T. 1811, K. B., 13 East, 232); and where an agreement between several parties had a stamp for each name but two, which appeared to have been erased, it was holden that it lay on the defendant to say that the erasure took place after it was stamped. (*Waddington* v. *Francis*, M. T. 1804, K. B., 5 Esp. 182).

† Only applies to those cases where it is not expressly prohibited by statute, as bills of exchange and promissory notes, &c. (55 Geo. 3, c. 184).

BOUSFIELD *v.* GODFREY, H. T. 1829. C. P. 5 *Bing.* 418; S. C. 2 *M. & P.* 771.

THE plaintiffs and defendant mutually executed an agreement, which was deposited in the hands of Rogers, a trustee. Shortly afterwards the defendant improperly procured it from the trustee, and neglected to return it. The plaintiffs demanded it from the defendant about a fortnight after its execution, for the purpose of getting it stamped, but he refused to restore it. In an action for a breach of the agreement, the plaintiffs obtained a Judge's order that the defendant should produce the original agreement, or a copy; which copy being read at the trial (if stamped), the defendant should be precluded from setting up the original. On motion to rescind this order, the defendant having sworn that the original was either lost or destroyed, but his attorney admitting that he had a copy—

and where a party to an agreement within the twenty-one days for stamping purloins it, the Court will order him to produce a copy, and get it stamped.

Per Cur.—The affidavit as to the loss or burning of this agreement is very loose; and the assertion of the defendant, that he has not seen it since February 1828, is expressly contradicted by his own letters, dated in the months of July and August of that year, wherein he admits it to have been then in his possession. When executed, the agreement was deposited with Rogers, as a trustee for all parties; and the defendant has not denied that he obtained it from Rogers, under pretence of taking a copy of it. There has been no attempt on the part of the plaintiffs to defraud the revenue; for it seems that within a few days after the execution of the instrument they demanded it from the defendant for the purpose of having it stamped, but that the defendant refused to let them have it. It is admitted that the attorney for the defendant holds a copy. We do not therefore see any objection to the latter part of the order, which requires him to deliver a copy of it to the plaintiffs, in order that they may stamp it, to give in evidence at the trial.

IV. RELATIVE TO THE PARTIES WHO MAY CONTRACT.

(*a*) IN GENERAL*.

LANT *v.* WEDLAKE, M. T. 1840. Q. B. 3 *P. & D.* 499.

AN agreement was subsisting between the plaintiff and defendant for the supply of coals for a term to expire at a future day, and to which R., a partner of defendant, was a party; a new agreement was made to commence at the expiration of the former as between the same parties, but R. never executed it, and declined doing so, although it was acted on by the other.

Where a contract was to be signed by A. and B., A. signs and B. declines, it is for the jury to say whether A. signed on the faith that B. would also.

The Court held, that the Judge ought to have left it to the jury to say whether the execution by the one was made on the faith that

* All persons having legal capacity may enter into a contract or agreement. Where, on the trial of an indictment, the defendant and prosecutor, with consent of the Court, arranged the terms of putting off the trial, the defendant consenting to pay the costs of the day, the terms indorsed by counsel on the brief, and, after some subsequent discussion as to the amount, promising to arrange or pay the amount:—Held, that such agreement and promise taken together were binding and sufficient to go to the jury as on an account stated, independently of any order of the Court. (*Porter* v. *Cooper*, 1 C., M. & R. 387; S. C. 4 Tyrw. 456; S. C. 6 C. & P. 354; abridged, ante, Vol. 2, p. 199).

all should execute, and that R. was consenting to and would join in the instrument, and be an additional securety for the performance of the agreement.

WENTWORTH *v.* COCK, T. T. 1839. Q. B. 10 *Ad. & E.* 42; S. C. 2 *P. & D.* 251.

An agreement to supply a certain quantity of stone, and a certain other quantity monthly, if required, is binding on the representatives of the vendor.

A CONTRACT to supply to A. from 50 to 100 tons of stone of certain dimensions monthly; also from 100 to 300 tons of blocks of other dimensions monthly, and any further quantity that he might require, not exceeding 200 tons per month; the contract to be in force to a certain time unless previously cancelled by mutual consent. Before the completion the contractor died. On the question whether the contract was binding on his administrators or merely personal—

The Court held it was binding on the representatives, and that they were bound to perform it.

V. RELATIVE TO THE CONSIDERATION.

(*a*) WHAT A SUFFICIENT CONSIDERATION TO SUPPORT A CONTRACT.

1. *In general**.

PRICE *v.* EASTON, H. T. 1833. K. B. 4 *B. & Ad.* 433; S. C. 1 *N. & M.* 303.

The plaintiff must not be a stranger to the consideration.

DECLARATION stated, that W. P. was indebted to the plaintiff in the sum of 13*l.*, being the balance of an account for a timber carriage before then sold and delivered by the plaintiff to W. P., and at his request; and that the said W. P. being so indebted, the plaintiff, in consideration thereof, and in consideration that W. P. at the request of the defendant would work for the defendant, and would leave the produce accruing of and from the work with the defendant, he the defendant undertook and promised the plaintiff to pay the plaintiff the said sum of 13*l.* for the said last-mentioned timber carriage, provided the amount was earned by W. P. and left in the defendant's hands. Averment of performance by W. P., and breach that defendant did not pay. After verdict motion was made in arrest of judgment, upon the ground that there was no consider-

* A promise is a nudum pactum in the absence of either a damage, an advantage, or a mutual agreement. (*Cooke* v. *Odey*, E. T. 1789, K. B., 3 T. R. 653).

Doing that which is beneficial to the defendant is a good consideration; (*Yates* v. *Hall*, M. T. 1785, K. B., 1 T. R. 76); as a release of an equity of redemption. (*Thorpe* v. *Thorpe*, E. T. 1700, K. B., 1 Ld. Raym. 662; S. C. 1 Salk. 171).

By doing that which is not beneficial.—As, a promise made in consideration of the cession of an advantage by another party is binding. (*Williamson* v. *Clements*, E. T. 1809, C. P., 1 Taunt. 523; S. P. *Pillans* v. *Van Mierop*, 3 Burr. 1663). So, *suffering a third person to do a beneficial act* is a good consideration, as in consideration of a commanding officer giving a soldier leave of absence at the instance of a third person. (*Taylor* v. *Jones*, H. T. 1768; K. B., Lord Raym. 312). The plaintiff had verbally agreed with J. E. for the purchase of certain houses, the defendant in writing had agreed to give the plaintiff 40*l.* for his bargain; the houses were afterwards at plaintiff's request conveyed to the nominee of the defendant: —Held, that the transfer of the parol bargain was a sufficient consideration for the promise of the defendant. (*Seaman* v. *Price*, M. T. 1824, N. P., R. & M. 195; S. C. 1 C. & P. 586).

ation passing between the plaintiff and the defendant, so as to make the undertaking of the defendant good as between them.

And of that opinion were the Court, and arrested the judgment.

WILKINSON *v.* BYERS, E. T. 1834. K. B. 1 *Ad. & E.* 106; S. C. 3 *N. & M.* 853.

Payment of a sum immediately by a defendant to the plaintiff, who promises to stay an action, is a good consideration for the promise in an action for unliquidated damages.

IN assumpsit the declaration, after reciting that an action had been commenced in the Palace Court by T., as the defendant's attorney, for the recovery of a certain sum, to wit, the sum of 13*l.* 10*s.*, alleged to be due from the plaintiff to the defendant, stated, that, in consideration that the plaintiff would pay the defendant the sum of 13*l.* 10*s.*, the defendant promised plaintiff to settle with the said attorney for the costs of the action, &c.; and that plaintiff paid the money, but defendant did not settle with the attorney, who in consequence proceeded with the action and plaintiff was damnified. After verdict on motion to arrest the judgment—

Per Cur.—If the action be brought for an uncertain demand, it is competent for the defendant to pay a smaller sum in discharge of the demand; and a promise to pay a specific sum for an uncertain demand on staying further proceedings is founded on a good consideration. In this case primâ facie the action was for an uncertain demand, and it does not happen in nine cases out of ten that there is a certain demand, in the sense in which we use the term. It is necessary, in order to make out that the payment was not a good consideration, that there was a specific ascertained sum of 13*l.* 10*s.* due from the plaintiff to the defendant.

LEWIS *v.* DAVISON, H. T. 1839. Ex. 4 *M. & W.* 654.

So, an agreement, in consideration of time being given on a judgment, that defendant would surrender a debtor into custody on a ca. sa., is not illegal, unless unlawful means are to be used*.

THE declaration stated, that, in consideration that the plaintiff would forbear to sue J. D., and would receive from him some money and promissory notes on account of the debt, the defendant undertook upon the dishonour of the notes, or if the plaintiff should sue out a writ of capias or detainer against J. D., he would surrender him into the custody of the sheriff, so that he might be arrested or detained on the writ, or upon failure to do so that the defendant would pay the plaintiff the amount of the notes; it also averred that the plaintiff received from J. D. certain notes drawn and indorsed by J. D. To this declaration the defendant demurred, on the ground, that the contract declared on was unlawful at common law in the first branch thereof, and the defendant was under no liability to perform it, and also because it did not appear that the plaintiff had any right of suit on this note against J. D.

Per Cur.—We assent to the general proposition, that an agreement to do an unlawful act cannot be supported in law, but it appears to us that is not so necessarily in this case. When the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it is not to be presumed that the contract was to do the unlawful act. The proper inference is otherwise. Here the contract is in the alternative. James Davison is either to be arrested or the defendant is to pay the money. It must be taken that he was to be arrested only by lawful means, and if the

* If an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other. (*Stevens* v. *Webb*, T. T. 1835, N. P., 7 C. & P. 60).

defendant cannot cause that to be done, he is to pay the money due upon the notes. The contract, therefore, is not necessarily unlawful, and is not to receive such a construction.

WILKINSON *v.* OLIVEIRA, H. T. 1835. C. P. 1 *Bing. N. S.* 490; S. C. 1 *Scott*, 461.

So, giving up letters, which enables defendant to recover a sum of money,

THE declaration stated, that, the defendant being in controversy respecting his claim to property of O. deceased, and the plaintiff possessed of a certain letter in the handwriting of O., shewing matters by which the defendant might recover a large portion of the property, in consideration thereof the plaintiff had given at the request of the defendant such letter to the defendant to be used for that purpose, and that the defendant had used the same and obtained the property; and then alleged that the defendant promised to give him £——. On the question whether the declaration disclosed a sufficient consideration—

The Court held, that there was a sufficient consideration.

SHILLIBEER *v.* GLYN, M. T. 1836. Ex. 2 *M. & W.* 143.

or that if the plaintiff would pay into defendant's bank a sum of money, he undertook to forward it to plaintiff at a certain place and time:—Held, a sufficient consideration.

IN assumpsit the declaration stated, that the defendants were bankers, and that the plaintiff being about to proceed to Northampton paid into their banking-house in London a sum of money, that they might cause the same sum to be paid to him at Northampton at a certain time then agreed upon between them, and the defendants received the sum of money for that purpose, and thereupon in consideration of the premises promised to cause the sum of money to be paid to him at Northampton at the time agreed upon. On demurrer—

The Court held the declaration to disclose a sufficient consideration for the promise, observing, a banker's business is to borrow money and to repay it on cheques. The thing to be considered here is, what is the meaning of the allegation in the declaration. Is it that the money was to be paid absolutely, and that the defendants undertook to forward it as carriers? If it be an absolute undertaking to pay at Northampton the declaration will suffice; if it be an undertaking to forward on a deposit, there ought to have been a request. But we think it the *former*, and the declaration therefore sufficient.

MORTON *v.* BURN, T. T. 1837. K. B. 2 *N. & P.* 297.

A parol promise to pay a bond by instalments in consideration of the assignee not to sue after verdict;

IN assumpsit the question was, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount. It was objected that there is no mutuality in the agreement, for that if the plaintiff had sued the defendants in the obligee's name the promise to forbear would have been no answer. Again, that there is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond; and further, that, if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law.

But the Court held the objections not sufficient to arrest the judgment.

TIPPER *v.* BICKNELL, E. T. 1837. C. P. 3 *Bing. N. S.* 710.

IN assumpsit the plaintiffs alleged in their declaration, that one R. applied to them to accept for his accommodation certain bills of exchange, and offered them as a security for repayment of such monies as they might pay upon the bills to procure the defendants to deliver to the plaintiffs certain deeds and writings; that R. requested the defendants that on the accepting of the bills they would undertake to deliver to the plaintiffs the deeds and writings on payment of the bills by the plaintiffs, of all which the defendants had notice, and in consideration of the plaintiffs' accepting the bills undertook and promised to deliver the deeds and writings to the plaintiffs on payment of the bills by them. On demurrer—

Per Cur.—The only agreement entered into here between the parties was, that upon the defendants' undertaking to give up the deed and security the plaintiffs would accept the bills; this was the promise which was made with the concurrence and the knowledge of all. If the declaration had been framed upon mutual promises it would, we think, be good; and it has been drawn upon the sounder reason and closer principle of those engagements being simultaneously made; it is still sufficient.

or where bills were accepted on a deposit of deeds, on a promise to return the deeds on the bills being paid:—Held, a good consideration.

RICHARDSON *v.* MELLISH, H. T. 1824. N. P. 1 *C. & P.* 241.

THE defendant having purchased twelve-sixteenths of an East India Company's ship chartered for four voyages, and commanded by plaintiff, agreed with him that he should resign the command in favour of defendant's nephew, and receive the command of another chartered only for one voyage, but which the defendant undertook to procure the company's consent to have changed for a more advantageous voyage, and in the event of the nephew's death or resignation before the four voyages were completed that the plaintiff should succeed to the original command; the plaintiff's agent also without his knowledge engaged to pay a sum of 2000*l.* if the plaintiff should not resign pursuant to the agreement, but the whole was subject to the approbation of the company, which was afterwards obtained, and the destination of the latter ship changed; the voyage however failing the plaintiff became bankrupt, and on the death of the nephew required to be re-appointed to the command of the former vessel, which defendant refused. In an action on the agreement—

Gifford, C. J., held, that such a contract made with the knowledge and sanction of the company was not illegal as a fraud or contravention of public policy, and that it sufficiently appeared on the declaration that the consideration was mutual.

So, a contract, in consideration that the plaintiff will resign the command of an East Indiaman, the defendant will appoint him to another vessel, is legal with the consent of the East India Company.

COPPOCK *v.* BOWER, M. T. 1838. Ex. 4 *M. & W.* 361.

PENDING a petition against the return of a member of Parliament, containing charges against the sitting member for bribery, corruption, and other illegal practices, and praying that the election and return might be declared null and void, the petitioners agreed, on receiving a pecuniary consideration, and on the sitting member

But a contract to pay £——, in consideration of forbearing to present a petition

against a M. P., is illegal*.

consenting that his election should be declared null and void, to proceed no further with the said charges.

Per Cur.—The question is, whether this is an unlawful agreement. We think that though it may not be so by any statute, yet it is unlawful by the common law. Here was a petition presented on a charge of bribery. Now, this is a proceeding instituted, not for the benefit of the individual, but of the public; and the only interest in it which the law recognises is that of the public. We agree that if the person who prefers that petition finds, in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time; but we do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to us unlawful to do so, as it would be to take money to stop a prosecution for crime. In either case the prosecutor might say that he is not bound, at his own expense, to continue an inquiry in which the public alone are interested; but such a reason does not amount to an excuse where he receives money for discontinuing the proceedings. Without saying whether it was unlawful to receive money as a consideration for constraining a future election, it is enough, in the present case, to determine that a contract for money to abandon a petition for bribery was illegal.

---

2. *By Compounding.* See ante, tit. *Compounding.*

3. *By abstaining from proving a Legal Debt, or executing an Instrument in favour of a particular Creditor.* See tits. *Bankrupt—Composition with Creditors.*

4. *To pay in default of Marriage.* See tit. *Marriage.*

5. *To pay on account of natural Love and Affection*†. See also ante, tit. *Bond.*

(*b*) When illegal.

1. *At Common Law.*

1.—*In general*‡.

2. *By Statute.*

1.—*In general*§.

(*c*) As to executed considerations ‖.

* Where a corporation having threatened opposition to a projected railway, the parties entered into an agreement with the corporation:—Held, that the corporation having received the benefit of such agreement, were bound by it, and that such agreements are not illegal. (*Edwards* v. *Grand Junction Railway Company*, 7 Sim., Ch., 337; affirmed, 1 Myl. & Cr. 226, 650).

† Natural love and affection is not a good consideration. (*Bret* v. *J. S. and Wife*, Cro. Eliz. 756).

‡ At common law any contract is invalid which violates the precepts of religion or morality, or the rules of public decency. (See Co. Lit. 206. b).

§ By statute, any contract is invalid which is prohibited and made unlawful by any statute, though the statute does not say it shall be so.

‖ An action does not lie on an executed consideration, unless the act be done at the request of the party, (*Hayes* v. *Warren*, E. T. 1731, K. B., 2 Stra. 933),

VI. RELATIVE TO THE SUBJECT-MATTER OF THE CONTRACT.

(*a*) As relates to services.

1. *In general**.

VII. RELATIVE TO THE MUTUALITY IN THE CONTRACT.

Lees *v.* Whitcomb, T. T. 1828. C. P. 5 *Bing.* 34; S. C. 2 *M. & P.* 86; S. C. 3 *C. & P.* 289.

An agreement to remain with the plaintiff two years, to learn her business, without a stipulation to instruct, is not binding, for want of mutuality †.

The declaration stated, that, before and at the time of making the agreement thereinafter mentioned, the plaintiff's wife was, and from thence hitherto had been and still was, a dress-maker and milliner; and that, therefore, on the 5th of June, 1826, in consideration that the plaintiff, at the request of the defendant, would receive the defendant into his house, and find and supply her with board and lodging, and cause her to be taught the trade and business of a dress-maker and milliner by the plaintiff's wife, the defendant agreed and undertook and promised the plaintiff to remain and continue with his wife for two years from the day and year aforesaid, for the purpose of learning the business of a dress-maker and milliner. It was then averred that the plaintiff, confiding in the defendant's promise, received her into his house, and that she remained there for a long time, to wit, from the said 5th of June, 1826, until the 14th of April, 1827; and that, during the time she so remained, the plaintiff supplied her with board and lodging and other necessaries, and caused her to be taught by his wife the trade and business of a dress-maker; that, although the plaintiff was ready and willing to have suffered the defendant to have continued for the remainder of the two years, and would have supplied her with board, &c. and taught her the trade and business of a dress-maker and milliner; yet that the defendant did not, although requested so to do, remain or continue with

either express or implied; (1 Roll. Abr. pl. 1); as, if the servant of A. be arrested for a trespass, and J. S., without the request of A., bails the servant, and afterwards A. promises J. S. to indemnify him, the promise is void, because the bailing which was the consideration was past, and executed before. (See Dyer, 272). But where the act which forms the consideration is done at the request of the party promising, the circumstance of the promise being subsequent in point of time to the consideration will not affect it; as, if A. requests B. to endeavour to procure a pardon for A., and after B. has made such endeavour, A., in consideration thereof, promises to pay him a certain sum of money, this is a good consideration. (See 1 Roll. Abr. 11 g, pl. 6). So, where a man pays a sum of money, or buys any goods for A. without his knowledge or request, and afterwards A. agrees to the payment, or receives the goods, this is equivalent to a previous request. (See 1 Saund. 264; Dyer, 272; T. Raym. 260).

* If a person undertakes to do a particular thing, the law implies an engagement on his part that it shall be completed in a skilful manner. (*Streeter* v. *Horlock*, T. T. 1822, C. P., 7 Moore, 287). A person who is to be remunerated for his labour according to the discretion of a committee, cannot make a claim unless awarded by the committee. (*Taylor* v. *Brewer*, E. T. 1813, K. B., 1 M. & S. 290).

† Both the contracting parties must assent. (*Cooke* v. *Oxley*, E. T. 1790, K. B., 3 T. R. 652; S. P. *Opy* v. *Peters*, M. T. 1671, K. B., 2 Lev. 23; S. C. 2 Saund. 850; *Harrison* v. *Austin*, T. T. 1688, K. B., 3 Mod. 237; S. C. Carth. 38; S. C. Campb. 138; S. P. *Smith* v. *Shelberry*, E. T. 1675, C. P. 2 Mod. 34; S. C. 1 Freem. 195).

the plaintiff's wife, or in his house; but on the contrary thereof, before the expiration of the said two years, to wit, on the said 14th of April, the defendant, without the license or consent of the plaintiff and his wife, or either of them, and against their will, left the plaintiff's house, and the service of him and his wife, and continued absent, whereby he had lost and been deprived of the profits which he would have otherwise derived from her service and assistance. The agreement was as follows:—"I hereby agree to remain with Mrs. Lees, of 302, Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand, this 5th day of June, 1826, Amelia Whitcomb." It was contended for the defendant that the agreement in question was void for want of mutuality or apparent consideration; and that was not the declaration adapted to the contract, supposing it to be valid.

Per Cur.—The agreement is bad. The defendant did not undertake to serve; nor was there any consideration for such service on the face of the agreement.

VIII. RELATIVE TO THE CONSTRUCTION OF THE CONTRACT.

(*a*) With reference to contracts made in England.

Hutchinson *v.* Bowker, T. T. 1839. Ex. 5 *M. & W.* 535.

Although the jury have the right to say what is the meaning of a word in a contract, still the Court are entitled to put their construction upon the contract itself*.

Assumpsit for the non-delivery of barley. It was proved at the trial, that the defendants wrote to the plaintiffs, offering them a certain quantity of "good" barley, upon certain terms; to which the plaintiffs answered, after quoting the defendants' letter, as follows:—"Of which offer we accept, expecting you will give us fine barley, and full weight." The defendants in reply stated, that their letter contained no such expression as fine barley, and declined to ship the same. Evidence was given at the trial, that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley.

The Court held, that although it was a question for the jury, what was the meaning of these terms in a mercantile sense, yet, that they having found what that meaning was, it was for the Court to determine the meaning of the contract; and the Court held, that there was not a sufficient acceptance.

Cross *v.* Eglin, E. T. 1831. K. B. 2 *B. & Ad.* 106.

The meaning of the word

Upon a contract to purchase "about 300 quarters, more or less, of &c., shipped on board the ship E., at H.," the ship brought 345

* Where several parties opened an account jointly with bankers:—Held to be a joint and several contract. (*Thorpe* v. *Jackson*, Chancery, 2 Y. & C. 553).

Upon a contract note for timber lying in the docks, at so much per load, to be taken at the dock amount, and paid for in cash, allowing two and a half discount, the duty being paid by the buyer:—Held, that the construction of the instrument, whether the discount was to be calculated on the whole sum, including the duty, or only on the price, was properly left to the jury; and they having found that it should be only upon the latter, the Court refused a new trial. (*Smith* v. *Blandy*, E. T. 1825, N. P., 1 R. & M. 260).

quarters, and the vendors refused to deliver any part, unless the purchaser would accept the whole; upon which, the latter abandoned the contract.

"about," in a contract, may be explained by parol evidence*.

The Court held, that, there being nothing to shew that a contract for the whole shipment was intended, the excess went beyond the real meaning of the contract, and that the plaintiff was entitled to refuse accepting the goods, and might therefore recover back the money which had been paid.

Semble.—In such a contract the evidence of mercantile men, as to the meaning of the terms "about," and "more or less," was admissible.

EDWARDS *v.* BAGSTER, T. T. 1836. Ex. 2 *M. & W.* 221.

The words "balance rent," mean the rent due at the date of the agreement†.

ASSUMPSIT for work done under the following agreement:—"Mrs. E. agrees with Mr. H. to cleanse the cesspools to the thirteen houses in S. street, for 8*l.* 2*s.*, Mr. H.'s rent-balance to be deducted from the said sum." H. was a weekly tenant to the defendant of one of the houses. The agreement was signed in the middle of one of the weeks of his tenancy. At that time £2 was due from him for rent, but when the work was completed, another week's rent had become due. The Judge at the trial, having expressed an opinion, that the rent-balance meant the amount due, when the agreement was signed, and the verdict having been found accordingly, the Court refused a new trial.

POWELL *v.* HORTEN, E. T. 1836. C. P. 2 *Bing. N. S.* 668.

Under a contract for "mess pork of S. & Co.," means to be manufactured by S. & Co.

THE plaintiff purchased from the defendant seventy-five barrels of mess pork, as the mess pork of Messrs. Scott & Co.; and all the casks bore the brand of those merchants. In addition to such brand, however, some of the barrels were marked with the letter W., and the pork which they contained was not the manufacture of Scott & Co., but of another merchant, from whom they had purchased it. The article contained in these latter casks was inferior to that which was manufactured by Scott & Co., and, though mess pork, was not prime.

The Court held, upon the defendant's refusing to take back the pork, that the plaintiff was entitled to sell the article, and bring an action for the difference of price between that which was not the manufacture of Scott & Co., and that which *was;* as the brand upon the barrels amounted to an engagement that the pork was cured by Messrs. Scott & Co., and that they were not alone the consignors, but the manufacturers also.

* Where a particular usage prevails in a certain district, a contract made between parties resident within that district, which makes no mention of the usage, must, generally speaking, be taken to have been made subject to, and in conformity with, such usage; for though usage is not admissible to defeat or contradict a contract, it is admissible to explain or confirm it. (*Brown* v. *Burtinshaw*, 7 D. & R. 603; Abr. post, tit. *Landlord and Tenant*).

† A tenant agreed to work a coal mine, so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—Held, that, under these circumstances, the tenant was not bound to work the mine, and that under the words, "fairly workable," a tenant was not bound to work at a dead loss. (*Jones* v. *Shears*, 1836, N. P., 7 C. & P. 346).

TAYLOR *v.* BRIGGS, M. T. 1827. N. P. 2 *C. & P.* 525; S. C. *M. & M.* 2.

In the cotton trade, the word "bale" means a compressed bale, and is not synonymous with bag.

THE whole question was, as to the meaning of cotton "*in bales.*" It was proved, that if a quantity of cotton be put simply into a bag, it is called a bag of cotton; but that, if, after that, it be compressed into a cubical form, so as to take less room, it is then called a bale—

Per Abbott, C. J.—If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but that the word has acquired that particular meaning must be distinctly proved. The important point here is, as to the meaning of the word bale, one party contending that it means a compressed, the other party that it means a bag. I shall leave to the jury what was meant by the term bale? The jury, which was special, found, that a bale means a compressed bale.

BROWN *v.* DEAN, M. T. 1833. 5 *B. & Ad.* 848; S. C. 2 *N. & M.* 317.

A promise to pay 10*s.* in the 1*l.*, in consideration of discharging a debtor out of custody, means a promise to pay 10*s.* in the 1*l.* on the amount of the debt.

A. BEING arrested and in custody of the sheriff, at the suit of B., upon a writ indorsed "oath for 76*l.*" C., in consideration of B. discharging A., undertook to give his promissory note at six months for 10*s.* in the pound for the debt on the arrival of the discharge. It was contended, that the true construction of this agreement was, that the defendant thereby promised to pay 10*s.* in the pound, not on any debt existing between the parties, but on the debt for which an action had been brought. And—

Per Cur.—By the guarantie, the defendant promises to give a note for 10*s.* in the pound for the debt, and to pay the costs; the promise, therefore, is to give his promissory note for 10*s.* in the pound on a debt actually subsisting, for which A. had been arrested, and for which the discharge was to be given.

READING *v.* MENHAM, M. T. 1832. N. P. *M. & Rob.* 234.

A contract to keep a hired chattel in repair applies to accidents, but not negligence.

THE defendant produced a written agreement, which had been entered into between him and the plaintiff, by which agreement the plaintiff agreed to let a gig to the defendant, and "to keep the same in perfect repair, and to put new linings and new wheels once every twelve months, so long as the defendant should choose to keep it, at the rate of 18 guineas a year, without any further charges whatever. And it was then proved by the defendant's groom, that the accident which happened to the gig, did not arise from any negligence or improper driving of the defendant.

Per Denman, C. J.—Looking to the terms of the agreement, it seemed to him, that the only case in which the defendant could be subjected to the expense of the repairs was the case of damage happening to the gig through the wilful default of the defendant.

PARKER *v.* GOSSAGE, M. T. 1835. Ex. 2 *C., M. & R.* 617; S. C. 1 *T. & G.* 105.

And where a contract is to

A. AND B. contracted that A. should purchase, and B. should sell, the salt manufactured by B. at his salt-works, and that an account

of all the salt sent from the works should be forwarded to A., and that all the accounts should be kept open for A.'s inspection at all times. The agreement was to continue for fourteen years. And it was agreed that bankruptcy or insolvency on the part of A. should terminate the contract.

cease on bankruptcy or insolvency:—Held, that insolvency meant an inability to pay just debts.

The Court held, that the word "insolvency" did not mean the taking the benefit of the Insolvent Debtors' Act; but that A. being in insolvent circumstances, and unable to pay his debts, could not call upon B. to supply more salt, or to allow him to inspect the accounts.

LOVATT *v.* HAMILTON, H. T. 1840. Ex. 5 *M. & W.* 639.

Under a contract to deliver by a particular ship fifty tons of oil, if not so much the contract to be void, sending part by that ship and part by another does not satisfy the agreement.

THE defendants, by their broker, entered into a contract for the sale to the plaintiffs of fifty tons of palm oil, "to arrive per the Mansfield." "In case of non-arrival or the vessel's not having so much on board after delivery of former contracts, this contract to be void." At the time this contract was entered into, the defendants had several vessels on the coast, for the purpose of obtaining palm oil, and, amongst others, the Mansfield and the Watt. After the date of the contract, the Mansfield was loaded with 315 tons of palm oil, and sailed homewards. On her arrival at Cameroon, the defendants' agent ordered the captain of the Mansfield to tranship part of her cargo to the Watt, which was the larger vessel. This transhipment was accordingly made, bonâ fide and without fraud, for the purpose of enabling the Watt to proceed home with a full cargo. The Watt proceeded on her voyage, and arrived in Liverpool on the 8th of April, 1838, and the Mansfield on the 20th of May following. The Mansfield, on her arrival, had on board 235 tons of palm oil; but the contracts made previously to the above contract amounted to 228 tons, leaving only seven tons applicable to this contract, which were delivered by the defendants to the plaintiff. In an action for the non-delivery of the oil—

The Court held—first, that the arrival of the oil in the Mansfield was a condition precedent; and that the plaintiffs were not entitled to the oil brought by the Watt; secondly, that the contract for the fifty tons was entire, and that the plaintiffs were not entitled to the seven tons brought by the Mansfield over what were required to satisfy former contracts.

ALLEN *v.* CAMERON, T. T. 1833. Ex. 1 *C. & M.* 832; S. C. 3 *Tyrw.* 907.

A contract to plant and keep trees in order for a certain time, means to "weed the ground" as well as "prune the trees." And in construing such a contract, if ambiguous, the price to be paid will be taken into consideration.

IN an action on an agreement by plaintiff to plant a quantity of trees, and "well and sufficiently to keep them in order" for two years, except from injury by sheep, game, or cattle, and to replant such as should die during that period, *Parke*, J., rejected evidence tendered by the defendant, that the trees had been destroyed by being choked up with weeds and grass, and were of no value; and the jury found a verdict for the plaintiff, and that "well and sufficiently to keep in order" meant pruning only.

Per Cur.—What is the meaning of "well and sufficiently keep in order?" It is desirable that another jury should state their opinion of what is meant. You cannot keep trees in order unless you remove what impedes their growth; if there is any foulness, or anything by which nutriment is withheld, they are primâ facie not kept

in order. We should not have thought that the price ought to have been taken into consideration any more than the amount of premium in a policy can be looked to, in order to ascertain the risk insured against, (*Gabay* v. *Lloyd*, 3 B. & C. 793—795; and see 9 B. & C. 259), unless "keeping in order" had been an equivocal expression; but in this case, it is primâ facie an ingredient, from which a construction of such an agreement as this may be come at. If it is clear that the value of 70,000 trees would have exhausted the full sum, it is a ground for saying, that, after an equivocal expression, it is not for the Court to enlarge the sense of the words; but if the price of the trees would amount to a proportion only of the sum agreed on, then the surplus must be for something, and "keeping in order" must mean something more than pruning. The price, therefore, is an ingredient in the construction of an agreement, in which equivocal words are used; and, therefore, we think another jury should determine what is the true construction.

ELLIS *v.* THOMSON, M. T. 1837. Ex. 3 *M. & W.* 445.

Parol evidence is admissible to shew what is a reasonable time for delivery under a contract.

IN assumpsit for not receiving lead on a contract, deliverable in "T.," plea, that the plaintiff was not ready to deliver within a reasonable time in manner and form, &c., on which issue was joined—

The Court held, that the evidence of the broker of the defendant, that, "at the time of the contract, the lead was said to be ready for shipment," was admissible, not to vary the contract, but as material to the issue, what was a reasonable time for delivery:—Held also, that the usual places of shipment being at G. or L., it was rightly left to the jury to say, whether one or other of those places was not to be intended as the place where the goods were ready to be shipped.

COX *v.* TODD, M. T. 1825. K. B. 7 *D. & R.* 131.

A contract to deliver "all in April or sooner," and the ship arrived on the 29th of April, and would take four days to unload, is not complied with.

IT was agreed, on the sale of a large quantity of oats, that they should be "delivered in April, or sooner," alongside a sloop or warehouse of the vendees. A vessel arrived, with the oats on board, alongside such a warehouse on the 29th of April, but it would have occupied four days to unload her. The vendees refused to accept the oats. In assumpsit—

Per Cur.—Suppose that a storm had wrecked the vessel on the 29th of April, could it have been said, that the goods were not in the possession of the master of the vessel, and that the underwriters would not have been liable on a policy of insurance on those goods? There is no authority to shew that a delivery amounts to nothing more than bringing the goods to the place agreed upon. They ought to have been conveyed to the defendants, and put in the possession of the defendants before the expiration of the time stipulated in the agreement.

TARLING *v.* BAXTER, H. T. 1827. K.B. 6 *B. & C.* 360; S. C. 9 *D. & R.* 272.

A rick of hay was to be paid for within a month, but not to be cut until

A STACK of hay was sold, and by agreement was to remain on the premises of the vendor until a given day; and was not to be cut by the vendee until he paid for it; and before the day of payment arrived it was accidentally burnt. It was contended, as this was a

sale upon credit, the vendee was not entitled to have possession of the hay until the credit was expired; and, therefore, the property was not in him at the time of the fire—

paid for; in the mean time it was consumed by fire:—Held, that it had passed to the vendee, and he must bear the loss.

Sed per Cur.—In all cases of the sale of goods, it is a rule, that where nothing remains to be done by the seller, as between him and the buyer, before delivery, the property in the goods passes to the buyer; and the property in the price to the seller. If any act remains to be done by the seller, the property does not pass until the act has been done. In this case, we are of opinion, that the property immediately passed to the buyer under the contract; and that the seller acquired his right to the price agreed upon to be paid, notwithstanding that payment was not to be immediate, and that there was a stipulation that defendant should not cut the hay until it was paid for.

SIMMONS *v.* SWIFT, T. T. 1826. K. B. 5 *B. & C.* 857; S. C. 8 *D. & R.* 693.

But under a contract to take timber by weight at a certain day, if part be delivered, and not the residue, which was damaged before that day, the vendee is not subject to the loss.

ON a contract for a stack of bark, at £—— per ton, to be taken and paid for on a day fixed, and part was afterwards weighed and delivered, but the residue was injured by a flood, although a sufficient time had elapsed for the purchaser to have removed it—In an action for goods sold and delivered—

The Court said, there were two questions—first, whether the property passed to the defendant; and secondly, if it did, did the possession also pass by delivery, so as to entitle the plaintiff to recover in this form of action? They were of opinion against the plaintiff on the first point, so that it would not be necessary to go fully into the second, though they were also of opinion that there had been no delivery. Any accident which happens to goods, after the property is changed, must be at the loss of the buyer. But here something remained to be done by the seller. The goods were sold at so much per ton. They were to be weighed to ascertain the sum; and the payment was to be made on the 30th of November. The plaintiff had a right to keep the goods until he weighed them, though he might have weighed, and thrown the risk upon the buyer. The distinction between this case and *Hanson* v. *Meyer*, (6 East, Rep. 614), was very slight and immaterial. There was nothing here to take away the plaintiff's lien, nothing to shew that he would not have had a right to insist upon being paid for the goods when he delivered them; and it followed that the risk of accident, while he kept them, must be his own. If the plaintiff had even declared specially on the contract, it would have been necessary to shew the weight.

STRUTT *v.* SMITH, T. T. 1834. EX. 1 *C., M. & R.* 312; S. C. 4 *Tyrw.* 1019.

Under a contract to pay in fourteen days, or bill at three months, the defendant, vendee, may elect, and the vendor cannot sue before

THE vendors sold goods "at $7\frac{1}{2}l.$ per cent. discount, bill at three months; and $10l.$ per cent. discount, cash in fourteen days;" and before the expiration of fourteen days brought indebitatus assumpsit, on the ground that the sale had been procured by fraud on the part of the vendee. The jury found a verdict for the plaintiffs, and that the defendant did not intend to avail himself of the $10l.$ per cent. discount, but to take the longer credit of three months—

Per Cur.—It is clear that the plaintiffs cannot avail themselves

the fourteen days, even though fraud be alleged.

of the defendant's fraud, so as to rescind the contract, and substitute a new contract of sale on different terms. They might possibly, on the evidence, have maintained trover on the ground that the fraud vitiated the contract; but, if they treat the transaction as a contract at all, they must take the contract altogether, and be bound by the specified terms. *Ferguson* v. *Carrington*, (9 B. & C. 59), decides, that, where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he might have maintained trover. Then, the question here is, what was the contract? There is some obscurity attending it; but we can see clearly that the defendant had fourteen days in which he had the choice either to pay cash at the end of that time, or to pay by a bill; and the jury have found that he availed himself of his option to take the credit. He was not, therefore, bound within the fourteen days to pay upon request.

STUDDY *v.* SAUNDERS, T. T. 1826. K. B. 5 *B. & C.* 628; S. C. 8 *D. & R.* 403.

The plaintiff contracted to sell all his cider to be manufactured on his premises by the defendant's men:—Held, by the usage of the county, the word "cider" meant the juice when expressed, and it was the duty of the defendant to give notice to the excise.

IN an action of assumpsit, it appeared there was an agreement by plaintiff to sell all his cider at £—— per hogshead, to be delivered at T., on &c., to be manufactured on his (plaintiff's) premises by defendant's own men; plaintiff to put the casks in working repair at 1*s.* per hogshead for the loan, and if any taken off the premises defendant to pay £—— per pipe.

The Court held, that, by reference to the usage of the county, the word "cider" was to be construed the juice, when expressed; and that it was the duty of the purchaser to enter the premises with the excise; and the cider having been seized for default thereof before it had been completely manufactured, and the delivery on the day appointed prevented by the improper negligence of the defendant, the plaintiff was entitled to recover the price of the quantity of juice delivered, and the stipulated price of the casks lent.

PALMER *v.* TEMPLE, H. T. 1836. K. B. 6 *N. & M.* 159.

In an action for not delivering possession of houses according to contract, it is sufficient to shew that the delivery of attornment of the tenants, instead of actual delivery of possession, was the contract.

IN an action upon an agreement for not delivering possession of a public-house and certain cottages, let at a yearly taking, thereto belonging, on a particular day, on an issue joined, that it was agreed between the parties that the defendant should not cause the tenants to quit the cottages, but that, on the plaintiff's completing the agreement, the tenants should attorn to him and become his tenants, and that the plaintiff discharged the defendant from giving actual possession, it appearing that the plaintiff knew, at the time of executing the agreement, that the cottages were let to yearly tenants, and that he did not require actual possession of those cottages to be delivered to him until a quarter before twelve at night on the day on which, by the agreement, the possession of the premises was to be delivered—

The Court held, that it was rightly left to the jury to say, whether, under these circumstances, it was not the intention of the parties that actual possession should be given on that day of the public-house only, and that, from that time, the tenants of the cottages should be considered as tenants to the plaintiff, constituting an attornment.

LEIGHTON *v.* WALES, T. T. 1837. Ex. 3 *M. & W.* 545.

UPON an agreement for partnership in a stage-coach, to run at certain hours, and stipulating that, so long as the plaintiff should continue in the business of a coach proprietor, the defendant would not by himself, or with any other party, run or drive any coach over any part of the road at certain hours, under a penalty of 40*l.*, to be recovered as liquidated damages; and each also bound himself in a penalty for the true performance of the agreement, to be recovered as aforesaid.

The words, "under a penalty, to be recovered as liquidated damages," mean liquidated damages, and not a penalty;

The Court held, first, that the agreement for the partnership was a sufficient consideration for the partial restraint on the defendant's trade, and an action maintainable for breach of it, after dissolution of the partnership by notice from the plaintiff; and secondly, that the 40*l.* were to be considered as liquidated damages, and not as a penalty.

KEMBLE *v.* FARREN, T. T. 1829. C. P. 6 *Bing.* 141; S. C. 3 *M. & P.* 425.

BY an agreement containing various stipulations of different degrees of importance, some relating to matters of certain, and some of uncertain amount, it was provided that, in case of the breach by either party of any stipulation therein contained, he should pay to the other 1000*l.*, which sum was declared to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. In an action for the breach of a clause of an uncertain nature—

but where the damages are not liquidated, the mere mention that a sum is to be paid for non-performance does not make the forfeiture liquidated damages.

Per Cur.—We cannot distinguish this case in principle from that of *Astley* v. *Weldon*, (2 B. & P. 346), in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of 200*l.*, to be recovered in his Majesty's Courts at Westminster. Here there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it.

(*b*) WITH REFERENCE TO CONTRACTS MADE ABROAD*.

* A contract which is valid in a foreign state is legal in this country; (*Holman and Another* v. *Johnson*, T. T. 1775, K. B, Cowp. 341); and cannot be contravened by a private agreement entered into subsequently; (*Hulle* v. *Heightman*, M. T. 1801, N. P., 4 Esp. 75); and if an action be brought on a contract made in a foreign country, where the liability of the defendant would be different, it lies upon him to shew it. (1 D. & R., N. P., 41).

IX. RELATIVE TO ALTERATIONS IN CONTRACTS, AND EFFECT OF OTHER CONTRACTS CONTROLLING.

See also tits. *Bills and Notes—Bond—Covenant—Deed.*

LOVELOCK *v.* KING, H. T. 1831. N. P. *Moody & Rob.* 60.

Where a contract during its progress is altered, the contractor is bound to state it will increase the expense.

THIS was a case in which work was originally undertaken on a contract for a fixed sum, and alterations subsequently made, on which the plaintiff claimed to abandon the contract, and recover a measure and value price for the work actually done.

Per Lord *Tenterden*, C. J.—The work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. I think the jury would do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent that the effect of the alteration will be to increase the expense of the work.

CARPENTER *v.* BLANDFORD, M. T. 1828. K. B. 8 *B. & C.* 575.

Where a contract is to be completed by a certain day, a verbal consent to its being done on the following day, even by an agent, binds the principal*.

BY agreement in writing between the plaintiff and defendant, the former was to be the purchaser of the interest of the latter in a public-house, with the stock, furniture, &c. The details of the agreement are immaterial. The contract was to be completed on the taking of possession, which was fixed to be on the 25th of March 1828. On the day fixed for the completion of the contract, the appraiser for the defendant met the appraiser for the plaintiff in the street, when the plaintiff's appraiser stated that the plaintiff would be ready to complete the contract on the following day. The defendant attended at the time and place originally appointed, ready in all respects to complete the contract; and the plaintiff not appearing, the defendant determined to avoid the contract, and keep the deposit. On the following day the plaintiff attended, ready to complete, but the defendant then refused; whereupon the plaintiff brought the present action, to recover back his deposit-money. It appeared in evidence that contracts of this nature were not always completed on the stipulated day. Upon these facts—

Lord *Tenterden* told the jury, that, if the defendant meant to insist on a literal performance of the contract on the very day, he

* A contract cannot be altered by a servant without the authority of his master; as, where A. ordered of B. two suits of livery a year for his coachman; B. supplied one suit of livery, and at the desire of the coachman supplied plain clothes instead of the other:—Held, that B. could only recover from A. the price of the livery actually supplied. (*Hunter* v. *Berkeley* (*Countess of*), H. T. 1836, N. P., 7 C. & P. 413).

If there be a contract to convey at a certain price by charter-party, sending a bill of lading with the goods, without reference to the charter-party, does not vary the price to be paid. (*Mitchenson* v. *Begbie*, T. T. 1829, C. P., 6 Bing. 190; S. C. 3 M. & P. 442; abridged, ante, tit. *Charter-party*, vol. ii. p. 548).

should have given notice of his intention. The jury, upon this direction, found a verdict for the plaintiff, and the Court refused to interfere.

X. RELATIVE TO THE ADOPTION OF THE CONTRACT*.

XI. RELATIVE TO THE TRANSFER OF CONTRACTS.

See also tits. *Bills and Notes—Bond—Chose in Action—Covenant—Deed.*

OLDFIELD *v.* LOWE, H. T. 1829. K. B. 9 *B. & C.* 73.

Where A. contracts to make machinery for B., and makes part, but being unable to complete it, assigns it to C. with B.'s consent, who undertakes to see C. paid, B. is liable to C.

THE parties entered into a contract by which one was to supply the other with certain machinery. After the machinery had been partly worked, the manufacturer of it by deed assigned it in its then state to a third person. The deed was shewn to the party for whom the machinery was intended, who told the assignee to go on with the work, and he would see him paid. The work was accordingly finished by the assignee.

Per Cur.—The defendant, with a knowledge of the assignment, makes no objection to the arrangement, but says, "Go on with the work, and I will see you paid." This surely is an adoption of what had been previously commenced, and was evidence of a contract between the plaintiff and the defendant. The subsequent recognition of what had passed by the defendant was evidence of a contract between him and the plaintiff; and the defendant has had from the plaintiff, and from him alone, the benefit of the subject-matter of the contract—all that he contracted for. This alone, we think, is sufficient to entitle the plaintiff to recover.

XII. RELATIVE TO THE APPORTIONMENT OF CONTRACTS WHERE PART IS ILLEGAL†.

XIII. RELATIVE TO RESCINDING OR EXTINGUISHING CONTRACTS‡.

* The adoption of a contract must be the act of a free agent. (*Rex* v. *Inhabitants of Stowmarket*, 9 East, 210). An owner, by suing as for money had and received, to recover the proceeds of an unauthorized sale, does not adopt it. (*Hunter* v. *Prinsep*, 10 East, 378).

† It has been held that if an illegal contract be rescinded as to part, it must be abandoned as to the residue; (*Alexander* v. *Owen*, E. T. 1786, K. B., 1 T. R. 225); but in another case, where part of a contract arose upon a good consideration, and part of it on a bad one, it was holden divisible, and that the party might recover on that which was good. (*Robinson* v. *Bland*, 2 Burr. 1077; S. C. 1 Black. Rep. 234; and see 3 T. R. 418; 11 East, 165; 13 East, 87; 15 East, 440; 14 Taunt. 57, 105). So, if a contract be made upon two considerations, and one of them cannot be performed, this will not avoid the contract; and in an action thereon, the damages shall be intended to be wholly given for the good consideration. (See Cro. Eliz. 143; Sid. 38; 4 Leon. 3; Yelv. 56). So, if in consideration of two things, and one of them be insufficient, the other is valid. (See Tidd, 38; Cro. Eliz. 848; Id. 199). If an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other. (*Stevens* v. *Webb*, T. T. 1835, N. P., 7 C. & P. 60).

‡ After a contract has been rescinded by one party in consequence of the total non-performance of it by the other party, he may recover back any money which

ROUTLEGE *v.* GRANT, E. T. 1828. C. P. 4 *Bing.* 653; S. C. 1 *M. & P.* 717; S. C. 3 *C. & P.* 267.

Under a contract to give "a definitive answer within a stated time," the party may retract within that time;

THE defendant sent the plaintiff a written proposal for the purchase of the lease of his house, requiring, (amongst other things), that possession should be given "on the 25th of July," and a definitive answer within six weeks. The plaintiff, in answer, said that he accepted the proposal, and would give possession "on the 1st of August next." Before the expiration of the six weeks mentioned in the defendant's offer he withdrew it; and the plaintiff then wrote to him again, stating that he was willing to give him possession according to the terms of his proposal.

The Court held that, as the plaintiff had not accepted the defendant's offer in terms before the latter had retracted it, the agreement was not completed, and the defendant was at liberty to renounce it.

REES *v.* LINES, 1837. N. P. 8 *C. & P.* 126.

but a defendant saying he would never pay a farthing is not evidence that he abandoned the contract.

IN assumpsit on a building agreement and for extras, averring in the count on the former that the defendant had discharged, prevented, and hindered the completing it, on which issue was joined; and the particulars were for the materials under the agreement—

Coleridge, J., held, that the denial by the defendant, on being applied to in the course of the work for money, that he would never pay a farthing, was not evidence of the contract being abandoned by him, but that the plaintiff was entitled to recover for the extras, although not upon the agreement, which, not having been completed, he was not then liable to pay any thing.

PLANCHE *v.* COLBURN, M. T. 1831. C. P. 8 *Bing.* 14; S. C. 1 *M. & Scott*, 51; S. C. 5 *C. & P.* 58.

If however a contract be abandoned by one party, the other is entitled to compensation, without tendering the subject-matter of the contract.

DEFENDANTS engaged plaintiff to write a work,—"The Juvenile Library," for a certain sum, for a particular publication. After the plaintiff had done a portion of it, the defendants abandoned the publication. At the trial, it was proved that the plaintiff had written a large portion of the work, and had incurred some expense; but it did not appear that he had tendered any part of it to the defendants, who had abandoned "The Juvenile Library."

Per Cur.—While the special contract was open, the plaintiff could not revert to the common counts; but, by abandoning "The Juvenile Library," the defendants broke that contract; and the plaintiff, who ought not to suffer by their default, is entitled to recover for the work and labour he has actually performed for the defendants at their request.

BENNING *v.* DOVE, H. T. 1833. N. P. 5 *C. & P.* 427.

A. sold certain copies of a work to B., and undertook to sell them to no

A. HAVING printed a work, sold 300 copies to B., a bookseller, at 40*s.* a copy, binding himself not to sell to others in quires under 48*s.*, and in single copies, under 50*s.* a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agree-

he has paid under it, provided he has done nothing which can be considered as an execution of his part of the contract. As to the cases on this subject, see post, tit. *Money had and received.*

ment, he said to B.:—"I do not expect you to sell under 48*s.* and 50*s.*; but do as you like." When B. had sold a part of the 300 copies he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45*s.* and 46*s.* A., in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., persuaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B. D. had an interview with B., and told him this. D. said, that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied.

other person; he, however, sold some to C. C. afterwards offered to return them to B., who said he was satisfied:—Held, he could maintain no action against A.

Lord *Denman*, C. J., held, that neither the underselling by B., nor the transfer of the stock to the partnership, was a ground of nonsuit; but that the arrangement with D. was an answer to the action, if the jury thought it made an end of the dispute between the parties.

XIV. RELATIVE TO THE PERFORMANCE OF CONTRACTS*.

HIBBLEWHITE *v.* M'MORINE, T. T. 1839. Ex. 5 *M. & W.* 462.

THE declaration stated an agreement between the plaintiff and the defendant, whereby the defendant, in September, 1838, purchased fifty shares in the Brighton Railway Company, to be delivered and paid for before the 1st of March, 1839, or at any intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share, the plaintiff thereby binding himself to execute to the defendant a legal transfer of the said shares, for which the defendant was to make payment to the plaintiff on or before the 1st of March, 1839; and that if payment was not made by the defendant on or before the 1st March, the plaintiff should be at liberty to resell the shares. Averment, that the defendant would not accept and pay for the shares; that the plaintiff resold them at a great loss, and that the defendant refused to make good the loss. Plea—That, at the time of making the supposed agreement in the declaration mentioned, and of the mutual promises therein mentioned, he the plaintiff was not possessed of, or entitled to the said fifty shares in the Brighton Railway Company, in the declaration mentioned to have been purchased by the defendant from the plaintiff, or any of them; nor had he at that time entered into any contract for the purchase of such fifty shares in the

A vendor need not be possessed of, or have taken steps to procure the article he contracted to sell.

* A contract will be considered performed, if all *has been* done that ought to have been expected to have been done. (*Honeywood* v. *Howe*, 2 Chit. Rep. 142.)

On a contract to supply a warming apparatus:—Held, that although not altogether fit for the purpose, yet, if in any degree so, and capable of being made complete at a further expense, that the plaintiff was entitled to recover the price agreed for, subject to such deduction as it would be necessary to expend to render it complete. (*Cutler* v. *Close*, 5 C. & P. 337).

In assumpsit for goods sold and delivered, the value exceeding 10*l.*, being paper for a room, the plaintiff at the time making a memorandum of the price of the paper, and the charge of putting up; the paper was sent to the house of the defendant, then in the care of a charwoman, who took it in:—Held, that the jury were to be satisfied of the order being in fact given by the defendant, and this then was an acceptance by him, with intent to take them as owner. (*Smith* v. *Rolt*, 1840, N. P., 9 C. & P. 696).

said company, or any of them; nor had he at any time any reasonable expectation of becoming possessed of, or entitled to any such shares in the said company, within the time by the said agreement provided for the fulfilment thereof by the said plaintiff, otherwise than by his the said plaintiff's purchasing the said shares at the time of making the said agreement. Verification. Demurrer and joinder. The point for argument on the part of the plaintiff was, that it was immaterial that he was not possessed or entitled, as alleged in the plea.

Per Cur.—If a party contracts to sell goods, to be delivered at a future day, of which he is not possessed at the time of the contract, nor has entered into any agreement for the purchase thereof, nor has any reasonable expectation of becoming possessed thereof, within the time limited for the fulfilment of the contract, otherwise than by purchasing them after the making of the contract, such a contract is nevertheless valid. The dictum of Lord *Tenterden* to the contrary in *Bryan* v. *Lewis,* (1 Ry. & Moo. 386), is not law.

BRYAN *v.* LEWIS, E. T. 1826. N. P. 1 *Ry. & M.* 386.

Overruling a decision of Lord *Tenterden.*

IN February, 1823, the defendant sold nutmegs to one Dawson, to be delivered on the 6th of May following. It was proved that the plaintiff was not the owner of the nutmegs at the time of making the contract, and that he had bought them on the following 9th March.

Per Abbott, C. J.—I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract.

BATES *v.* HUDSON, M. T. 1825. K. B. 6 *D. & R.* 3.

A contract that the plaintiff will cure all the sheep, or make no charge, cannot be enforced unless he cures all.

IN an action for work and labour in curing a flock of sheep and lambs, consisting of 427, of the scab; it was proved that the plaintiff had declared that he did not expect to be paid unless he cured all; and it appearing that forty out of the flock were not cured.

The Court held, that he was not entitled to recover any thing.

PATON *v.* DUNCAN, E T. 1828. N. P. 3 *C. & P.* 336.

A subscriber to "a new history of a country, &c." is not bound to take a mere new edition of another work.

Per Lord *Tenterden,* C. J.—If one undertakes to furnish a new history of a country, this is not performed by his furnishing a book which is a translation of an entire previously existing history, though with his own continuation and some additions.

MORGAN *v.* BIRNIE, M. T. 1833. C. P. 9 *Bing,* 672; S. C. 3 *M. & Scott,* 76.

And where a third party is

IN a building contract, it was provided that the contract should not be vacated by any additions or alterations, but that the price to

be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises: and the defendant (the employer) agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction.

to certify that a contract has been performed, such certificate is a condition precedent.

The Court held, that the surveyor's certificate was a condition precedent to the plaintiff's right to sue upon the contract in respect of alterations.

Ess *v.* Truscott, E. T. 1837. Ex. 2 *M. & W.* 385.

Assumpsit.—The declaration set forth a contract, by which the parties agreed to be bound by the valuation of one James Cook, and then alleged that a valuation was made by him. The plea denied that the valuation was so made. At the trial before the Judge of the Palace Court, it appeared that the valuation was taken, not by Cook, but by Atkinson, his clerk or agent.

And if goods are to be taken at A.'s valuation, a valuation by his clerk is no performance.

Per Cur.—You can only support the declaration by shewing that the parties agreed to take Atkinson's valuation, as a valuation by Cook. If they agreed to substitute him for Cook, you should have declared on the substituted agreement.

Wilmot *v.* Smith, M. T. 1828. N. P. 3 *C. & P.* 453.

Per Lord *Tenterden*, C. J.—If A. agrees to make an article of certain materials for a stipulated sum, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price; nor can he require the article to be returned, because the buyer will not pay an increased price or sum on account of the better materials.

A contract to make an article at a fixed price is binding, even though much superior and more expensive than contemplated.

XV. RELATIVE TO THE REVIVAL OF CONTRACTS*.

XVI. RELATIVE TO THE EXCUSE FOR NON-PERFORMANCE OF THE CONTRACT.

(*a*) On account of the act of God†.

(*b*) On account of an act of law‡.

* A contract once dissolved cannot be revived by a subsequent agreement. (*Rex* v. *Inhabitants of Gresham*, 1 T. R. 101).

† Where the performance of a contract becomes impracticable through the act of God, and there is no provision therein exonerating the contractor from the performance under such circumstances, he must answer for the breach of it in damages; (*Shubrick* v. *Salmond*, 3 Burr. 1637; S. P. *Atkinson* v. *Richie*, 10 East, 530); hence a freighter who covenants generally to load a cargo, and is prevented from so doing by the prevalence of the plague, is liable to his covenant. (*Parker* v. *Hodgson*, 3 M. & S. 267).

‡ The performance of a contract may become impracticable through an act of law. As where a man marries a feme who has contracted debts before coverture,

(*c*) On account of an act of the party.

Holme *v.* Guppy, E. T. 1837. Ex. 3 *M. & W.* 387.

Where a contract is to be completed within a certain time, it may be shewn that the agreement could not be completed until after the time, through the act of another.

A contract stated that 40*l.* a week should be forfeited for every week that a building contract remained unexecuted; and it appeared that the builder was delayed several weeks by reason of the carpenters not being far enough advanced in their work, and that the building was retarded only one week by the mere negligence of the builder.

The Court held, that he was liable only to the penalty consequent upon the delay of one week occasioned by himself, and not for the delay occasioned by the other tradesmen employed by the owner of the house.

Vickers *v.* Cock, H. T. 1835. Ex. 3 *D. P. C.* 492.

Where work is to be approved by A., and the defendant refuses to allow plaintiff to complete the work because it is badly done, A. need not be called to prove it is badly done.

In assumpsit for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of A. B., and that part of the work *was* done, and part was *not* done to his satisfaction, and that therefore he discharged the plaintiff.

Per Cur.—The plaintiff could not have recovered for his work without proving that it was done to the satisfaction of A. B. The breach in the declaration was for discharging the plaintiff from doing the remainder of the work; to prove that, the defendant was certainly not bound to call A. B.: but the fact might be proved in any other way.

(*d*) On account of an act of a stranger*.

(*e*) On account of legal ignorance†.

(*f*) On account of misrepresentation.

Selway *v.* Fogg, E. T. 1839. Ex. 5 *M. & W.* 83.

A false representation in the quantity of work to be done does not avoid the contract, it

The plaintiff proved the work done, and that its value was about 20*l.* The defendant then gave evidence of a contract between the parties to do the work for 15*l.*, which sum had been paid. The plaintiff contended, that this contract was fraudulent, and that, if so, it was no answer to the action.—Lord *Abinger*, C. B., intimated his opinion, that the question of fraud was not open to the

he is liable to discharge them in her lifetime; but if she die previously, he will then be discharged from the payment of the debts by the act of law. But, if an attorney agree to prosecute and defend all suits for A. B., and he be afterwards appointed sheriff, he is not discharged from the performance of the contract, because an attorney is not bound to serve in that office,

* If a contract be to be performed by a stranger, and he refuses, it is no excuse for the non-performance of the agreement, because the contractor has undertaken that the stranger shall comply with his stipulation; (see 1 Roll. Abr. 452); as, if a contract be, that A. B.'s son shall do a certain act for C. D., and the son refuses. (See 22 E. 4, 26, b).

† As every man ought to be cognisant of the law, legal ignorance is no excuse for the non-performance of a contract; (*Bilbie* v. *Lumley*, 2 East, 470); but whether he may not be excused, if the payment be made under an uncertainty of facts, induced in some measure by the defendant himself, seems unsettled. (*Chatfield* v. *Paxton*, 2 East, 471, n.)

plaintiff, but that it should be made the subject of complaint in a separate action, especially as it appeared that the plaintiff had knowledge of the circumstances indicative of fraud before the work was finished. However, he left the facts to the jury, who found that there was fraud in the contract, and a verdict was accordingly given for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit, or a verdict for the defendant.

being the subject of an action for deceit.

The Court held, that the plaintiff could recover only according to the terms of that contract, although as soon as he discovered the fraud, he might have repudiated the contract, and sued the defendant for deceit.

PILMORE *v.* HOOD, M. T. 1838. C. P. *7 D. P. C.* 136; S. C. 5 *Bing. N. S.* 97; S. C. 6 *Scott*, 627.

THE declaration alleged, that the defendant entered into an agreement with one B. for the sale of a lease of a public-house for a certain sum; and that at and before the said agreement, the defendant falsely, fraudulently, and deceitfully pretended and represented to the said B. that the trade of the house had been and then was 180*l.* per month, all retail over the counter; and the said B. not being able to complete the contract, it was agreed between the plaintiff, the defendant, and B., that the plaintiff should become the purchaser instead of B.; and at and before the agreement, B. communicated to the plaintiff the statement and representation as to the value of the house made by the defendant to him, of which the defendant had notice; and the plaintiff, confiding in such representation, agreed to become the purchaser of the premises for a certain sum, which he paid to the defendant. It was then alleged, that the premises were not of the value represented by the defendant as he well knew, and that, by means of the premises, the defendant falsely and fraudulently deceived the plaintiff in the sale, and thereby the premises were of little or no value, &c.

Aliter as to the good-will of a business.

The Court held the agreement sufficient to support an action in the nature of deceit.

(*g*) ON ACCOUNT OF BEING IMPOSSIBLE*.

(*h*) ON ACCOUNT OF BEING MADE ON A SUNDAY.

BLOXSOME *v.* WILLIAMS, T. T. 1844. K. B. *3 B. & C.* 232; S. C. 5 *D. & R.* 82.

THE plaintiff, on a Sunday, made a verbal agreement for the purchase (with warranty) of a horse of the defendant, a stage-coachman and a horse-dealer, but which latter calling was unknown to plaintiff; the horse was delivered on a subsequent day, and the price paid, but the horse afterwards proved unsound. In an action on the warranty—

A contract made on a Sunday is binding, if not in the exercise of the party's ordinary trade.

The Court held, that the 29 Car. 2, c. 7, s. 1, against exercising

* An impossible contract is void, as if it be that B. will go to Rome the next day; (see Co. Lit. 206; 14 E. 4, 3; Leon. 189); but if two things be contracted for, and one becomes impossible, it is no excuse for not performing the other. (See 1 B. & P. 242).

a calling on a Sunday, did not apply to a bargain of this description, but only to manual labour and keeping open shops; but that the contract not being valid and binding until the subsequent delivery and acceptance, it could not be deemed a contract on the Sunday, when the future terms only were specified; and that the defendant being the person, if any, offending, and the plaintiff not knowingly concurring, and so not particeps criminis, might recover back his money as on a failure of consideration.

(*i*) On account of performance being illegal*.

(*j*) On account of insanity.

Browne *v.* Joddrell, T. T. 1827. N. P. *M. & M.* 105.

In the absence of fraud insanity is no answer to an action on a contract.

The defendant was charged as a member of an institution called the Athenæum, of which he had acted as president during the time the demand of the plaintiff was accruing; he had subsequently been declared a lunatic under an inquisition from a period before that time; and the defence, which was conducted by his relations, was, that he was of unsound mind at the time the goods, &c., were supplied, and therefore incapable of contracting—

Per Lord *Tenterden*, C. J.—The defence will not avail, unless it be shewn that the plaintiff imposed on the defendant.

(*k*) On account of an accident.

Bacon *v.* Simpson, H. T. 1837. Ex. 3 *M. & W.* 78.

No action lies for non-completion of a contract arising from accident, as premises being consumed by fire.

In assumpsit on an agreement to assign the lease of premises, the furniture to be taken at a valuation, the declaration averring that the plaintiff was ready and willing to assign, &c.; plea, traversing that the plaintiff was ready &c.; the completion of the agreement was, by subsequent indorsement, postponed from the 1st to the 6th of January, and on the evening of the day on which it was signed, the premises were partly destroyed by fire; the plaintiff was the widow of a sub-lessee, and had not then taken out administration, but did so before the 1st of January:—Held, first, that the party being bound to complete the contract on the terms stipulated, which it was out of her power to do, the contract could not be carried into effect by the parties; secondly, that the postponement, under the change of circumstances, was a new contract requiring a new stamp, and strictly that the issue, whether the plaintiff was lawfully possessed of the interest at the time of making the contract, was an immaterial issue.

* No contract can be properly carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal by virtue of some subsequent law; and the non-performance of such contract is not only excusable, but a matter of peremptory obligation on the part of the subject. (*Atkinson* v. *Ritchie*, 10 East, 530; S. P. *Barker* v. *Hodgson*, 3 M. & S. 267).

XVII. RELATIVE TO THE FORM OF ACTION ON CONTRACTS *.

(*a*) Special assumpsit †.

Gwynne *v.* Davy, M. T. 1840. C. P. 9 *D. P. C.* 1; S. C. 2 *Scott, N. S.* 29.

Special assumpsit † will not lie on a simple contract merely extending the time for the performance of a deed.

The plaintiff declared in assumpsit, and the declaration recited a deed under seal, which had been entered into, for the performance of certain stipulated operations in chemistry, by the 21st of June, 1838, and which might be determined by the defendants, upon notice given in case of the non-fulfilment of the contract by that time, and alleged a subsequent parol agreement between the parties extending the time for completing the contract to the 21st of Decembee, 1838; but it contained no statement of the determination of the deed. Upon demurrer—

The Court held, that the action was wrongly conceived in assumpsit upon the parol agreement, and that covenant should have been brought upon the original deed.

(*b*) Indebitatus assumpsit ‡. See also, ante, tit. *Assumpsit.*

* *When it should be indebitatus or special assumpsit.*]—The distinction between these two species of remedies, and their relative application to different contracts, may be thus succinctly stated:—The action is special when the plaintiff declares upon the original agreement, setting forth the particular language in which it is expressed, or stating the legal effect and operation of it, thus making the special contract the foundation of the suit; as, where he declares upon a bill of exchange, promissory note, policy of insurance, guarantie, wager, warranty, or other similar undertaking. The action is general when the plaintiff, instead of setting out the particular language, or effect of the original contract, declares as for a certain debt arising out of the execution of the contract, where that constitutes such a debt, or upon the promise raised or implied by the law upon the execution of the contract, where no specific sum is stipulated to be paid on the execution of it, in which case the law implies that so much is to be paid as shall be reasonably due. Hence it is a rule that so long as a contract is executory the party must declare specially, but when it is executed he may declare generally.

† Special assumpsit is the only form of action that can be sustained on a collateral engagement. (*Hard's case*, H. T. 1695, K. B., 1 Salk. 23; S. P. *Anon.*, M. T. 1558; S. C. Hardres, 486; S. P. *Mines* v. *Sculthorpe*, 2 Campb. 215). Assumpsit does not lie where there is no certain duty or contract express or implied; (*Mayor of Northampton* v. *Ward*, 1 Wils. 107; S. C. 2 Stra. 1238); nor, where a party has taken a bond or other higher security. (*Toussaint* v. *Martinnant*, 2 T. R. 104).

‡ Where there was a special agreement, the plaintiff could not formerly proceed to recover his debt under a general indebitatus assumpsit. (*Weaver* v. *Boroughs*, 1 Stra. 648). But it is now settled, that, if he prove a special contract, and the work done be not pursuant to the agreement, he may recover on the quantum meruit. (*Keck's case*, Bul. N. P. 139). And where the terms of a special contract are performed, it raises a duty upon which an indebitatus assumpsit will lie. (Fitz. 302; Bull. N. P. 139).

XVIII. RELATIVE TO THE PARTIES TO THE ACTION ON CONTRACTS.

WILLATTS *v.* KENNEDY, M. T. 1831. C. P. 8 *Bing.* 5; S. C. 1 *M. & Scott*, 35.

A receiver, who undertakes to give time in consideration of a third party becoming responsible, may sue, at all events, after verdict*.

DECLARATION, that C. K. was indebted to the firm of B. and S.; that plaintiff had been appointed by the Court of Chancery receiver of the debts of the firm, whereby C. K. became liable to pay plaintiff when requested; that, in consideration of the premises, and that the plaintiff, as such receiver, would give C. K. two months' time to pay, defendant promised to pay, in case C. K. omitted to do so within that time. Breach, that C. K. omitted, and that defendant never paid. On motion in arrest of judgment—

The Court held, that sufficient authority appeared for the plaintiff to contract and sue, and sufficient consideration for the defendant's promise, at all events after verdict.

LEE *v.* NIXON, E. T. 1834. K. B. 3 *N. & M.* 441; S. C. 1 *Ad. & E.* 201.

But if principal and surety contract "severally," they cannot be sued jointly †.

THIS was an action of assumpsit brought by one of the trustees of a turnpike-road (under 7 Geo. 4, c. 174) against the lessee and his surety, to recover part of the rent which had been left unpaid by Nixon, the principal. A verdict was found for the plaintiff, subject to the opinion of the Court upon a case, by which it appeared, that, in this case, as in that of *Bell* v. *Nixon*, (9 Bing. 393), the agreement for letting the tolls was signed by one only of two clerks, who were in partnership as attornies, and the undertaking by the defendants ran in the following terms:—"And the said John Nixon, as farmer or renter of the tolls, and the said Robert Davison as his surety, do hereby severally promise, undertake, and agree," &c.

Per Cur.—The defendant must have judgment. The word "severally" must be taken in the common acceptation, unless there is anything to shew that it was used in a contrary sense. Considering that the parties here were principal and surety, it is more in the nature of things that this should be a several than a joint undertaking.

XIX. RELATIVE TO THE HOLDING TO BAIL IN ACTIONS ON. See ante, tits. *Affidavit to hold to Bail—Arrest.*

* The action, whether founded on a contract express or implied, must be brought in the name of the party in whom the legal interest is vested, (*Thimblethorp* v. *Hardesty*, 7 Mod. 116), or of the person with whom it was actually made. (*Skinner and Another* v. *Stocks*, 4 B. & Ad. 437).

† And an action upon an express contract must, in general, be brought against the party who actually made it; (*Trewhella* v. *Rowe*, 11 East, 435); and upon an implied contract, against the party who is subject to the legal liability. (*Myrtle* v. *Beaver*, 1 East, 135).

In an action on a joint contract of two or more defendants, the Court refused to allow an arrangement offered by one defendant in the absence of the other, unless his consent were made either in person or by counsel. (*Dickinson* v. *Goom*, 1825, N. P., 2 C. & P. 194).

XX. RELATIVE TO THE DECLARATION.

(*a*) TITLE OF THE COURT. See tit. *Declaration.*

(*b*) VENUE *.

(*c*) DAY IN. See also post, tit. *Declaration.*

ARNOLD *v.* ARNOLD, T. T. 1836. C. P. 3 *Bing. N. S.* 81; S. C. 3 *Scott,* 547; S. C. 5 *D. P. C.* 203.

In assumpsit the day of the promise is immaterial †.

THE defendant pleaded non assumpsit to an action for money lent. The writ was issued on the 20th of February, 1836; the declaration stated the cause of action to have accrued on the 27th of February. On motion that the cause of action appeared on the face of the record to have accrued after the commencement of the action—

Sed per Cur.—In assumpsit the day on which the promise is laid is immaterial. It is not to be assumed the evidence was received on the trial of any thing that took place after the issuing of the writ. In *Cole* v. *Hawkins,* (Stra. 21), it was held, on demurrer, that the alleging a different day in the replication from that mentioned in the declaration was no departure, the day not being material.

(*d*) GENERAL REQUISITES.

(*e*) OF THE INDUCEMENT ‡.

(*f*) OF THE MODE OF STATING THE CONTRACT §.

PLATTS *v.* LEAN, H. T. 1829. N. P. 3 *C. & P.* 561.

A declaration for money paid

A. WAS indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be dis-

* The venue in this action is transitory, and may be laid in any county, at the election of the plaintiff. In assumpsit in an inferior court, not the promise only, but the consideration also, on which such promise is founded, must be laid within the jurisdiction. (*Ramsay* v. *Atkinson,* 1 Lev. 50; S. P. *Whitehead* v. *Browne,* Id. 96; *Drake* v. *Beare,* Id. 104, 105; *Price* v. *Hill,* Id. 137; *Stone* v. *Waddington,* Id. 156; *Hanstip* v. *Coater,* 2 Id. 87; *Waldock* v. *Cooper,* 2 Wils. 16; *Higginson* v. *Martin,* K. B., 2 Mod. 197; *Heaven* v. *Davenport,* 11 Mod. 365; *Winford* v. *Powell,* 2 Ld. Raym. 1310).

† But on a written instrument, where it is described as bearing date on a particular day, a variance is fatal. (See 2 Campb. 307; 1 Gow, 21; 1 Stra. 22; 10 Mod. 311; 6 East, 420; 4 East, 599).

‡ Where the consideration and promise explain themselves without reference to any collateral matter, they may be stated in the declaration without any inducement, although, when that is not the case, the declaration begins by stating the circumstances under which the contract was made, or to which the consideration or promise refers; as, in an action of assumpsit to pay money in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement need not state the person, time, or place with certainty. (*Alsope* v. *Sytwell,* Yelv. 317; S. P. per *Buller,* J., in *Gwinnit* v. *Phillips,* 3 T. R. 646). The inducement should, in general, be true and capable of proof. (*Lee* v. *Ayrton,* Peake, N. P. C. 119).

§ It is not necessary, in declaring on a written contract, to state that it was in writing; (*Anon.,* 2 Salk. 519; S. P. *Coxe* v. *Barber,* T. Jones, 158; S. C. 2 Raym. 450); though that circumstance must be declared in a plea; (*Case* v. *Barber,*

by A. to B., who is to re-pay A. on receiving it from C., need not be special.

charged on paying 700*l.* only. B. threatened to complain to C.'s employers, to prevent which C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C. the balance was recovered.

Per Lord *Tenterden*, C. J.—As soon as received by B., it became money had and received to the use of C.; and he need not declare as on a contract depending on the contingency.

SWEETING *v.* ASPLIN, M. T. 1840. Ex. 7 *M. & W.* 165.

But upon a written agreement, whereby A. is to do work for B. and C. to pay, the declaration must be special—the common counts will not do.

A CORPORATION agreed with the defendant A. their tenant, that he should build a house on the farm, and he accordingly applied to R., a bricklayer, who undertook and entered into a written contract with the corporation for the building, and engaged the plaintiff to do the carpenter's work, by a contract also in writing, it being understood and agreed between the said plaintiff and R., that the amount of the plaintiff's work should be paid by A. to the plaintiff only, and that such agreement should be his guarantee for so doing; on the same day the defendant, by letter to the plaintiff, reciting the work to be done by the plaintiff, thereby undertook to pay the same by having a proper discharge—

The Court held, that, whether an original or collateral agreement, it was yet such a special agreement as did not entitle the plaintiff to recover from the defendant under the common indebitatus for work and labour.

JAMES *v.* COTTON, H. T. 1831. C. P. 7 *Bing.* 266; S. C. 5 *M. & P.* 26.

Where a contract is rescinded by consent, and money is to be returned, the declaration need not be special.

IN assumpsit, it appeared that the plaintiff agreed to let to the defendant land on building leases, and to advance him £——, to be repaid by a certain day; and the defendant engaged to build houses thereon, and to convey them as a security. After some of the houses had been built, and part only of the money agreed to be lent advanced, the plaintiff requested the defendant not to proceed further with the buildings, which was assented to, and the agreement was rescinded by mutual consent.

The Court held, that, the day for repayment being passed, the plaintiff might recover the money advanced on the common counts, and was not bound to declare on the special agreement.

RADFORD *v.* SMITH, H. T. 1838. Ex. 3 *M. & W.* 254; S. C. 6 *D. P. C.* 381.

A declaration stated that the sheriff had taken the plaintiff's goods in execution under a fi. fa. issued on a judgment on a warrant of

IN assumpsit, the declaration stated that the sheriff had seized goods of the plaintiffs under a fi. fa., issued on a judgment upon a warrant of attorney, which was executed by the plaintiffs and R., for the use and benefit of the defendant, and to S. as his trustee, and as a security for monies due from the plaintiffs and R. to the defendant; that the goods continued in the hands of the sheriff, and thereupon it was agreed between the plaintiffs and the defendant that the plaintiffs should give the defendant two other warrants

T. Jones, 158; S. C., T. Raym. 450); but it must be stated in the declaration as really made, either in terms or according to its legal effect; and if there be a variance between the one stated and that proved, it is fatal. (*Bristow* v. *Wright and Another*, 2 Doug. 665; but see ante, tit. *Amendment*).

of attorney, one for the amount due on the judgment, the other for a debt due from R. to the defendant, and that the defendant should procure the goods to be re-delivered to the plaintiffs; that the plaintiffs did accordingly give the defendant the two warrants of attorney, but the defendant did not then or within a reasonable time procure, nor has he, although a reasonable time has elapsed, procured the goods to be re-delivered to the plaintiffs. Plea, that the warrant of attorney in the declaration mentioned to have been executed by the plaintiffs and R. was not given for the use and benefit of the defendant, or to S. as his trustee. On demurrer, it was objected that the declaration did not set out the warrants of attorney. The plaintiffs ought to have stated the legal effect of the instruments, so as to shew that the taking of them would be a benefit to the defendant. (*Bolton* v. *Fenne*, 1 Lev. 257). Again, the declaration does not state any request made to the defendant to re-deliver the goods. Where the contract is merely to pay money, no request need be alleged; but where it is to do some other specific act, a request must be shewn before an action can be founded on the default. But

attorney; and that, in consideration of their being restored, plaintiff would give defendant two warrants of attorney:—Held, not necessary to set out the warrant of attorney, or allege a request, to render it good on general demurrer.

The Court held the declaration was good on general demurrer, although the warrants of attorney were not set out, and although there was no averment of a request to the defendant to cause the goods to be re-delivered.

WILSON *v.* POWIS, H. T. 1826. C. P. 3 *Bing.* 633; S. C. 11 *Moore*, 543.

A DECLARATION in assumpsit stated, that, in consideration that the plaintiff had delivered a watch to the defendant to be repaired, the latter undertook to return it to the plaintiff, and assigned for breach that he did not return it. Proof that the defendant, having repaired the watch, tendered it to the plaintiff, who requested him to take it to his uncle, who would pay him for it; but the defendant being unable to find the plaintiff's uncle, delivered it to his brother, from whom it was afterwards stolen.

A., for whom an article had been repaired, said B. would pay for it:—Held, to raise no new contract, so as to form a variance.

The Court held, that the plaintiff was entitled to recover the value of the watch, although it was objected that there was a variance between the declaration and evidence, as the former ought to have been founded on the new contract to deliver to the plaintiff's uncle.

(*g*) OF THE MODE OF STATING THE CONSIDERATION.

BATES *v.* CORT, M. T. 1824. K. B. 2 *B. & C.* 474; S. C. 3 *D. & R.* 676.

IN an action on a special agreement, the declaration stated that by a certain memorandum, made between the plaintiff and one G. G., the plaintiff agreed to sell and deliver to G. G. a lace machine for 220*l.*, to be paid as follows: 40*l.* on delivery, and 1*l.* per week

The declaration must shew a consideration for the defendant's promise*.

* The plaintiff must shew in his declaration a legal and sufficient consideration for the promise; (*Allen* v. *Rescous*, T. T. 1675, K. B., 2 Lev. 174); and it must appear to be co-extensive therewith; (*Rann* v. *Hughes*, 1764, Dom. Proc., 7 T. R. 350, n.; 7 Bro., P. C. 556); unless the action be brought for a mere misfeasance, in which case a consideration need not be alleged. (*Elsee* v. *Gatward*, H. T. 1793, K. B., 5 T. R. 143). The whole of the consideration of the defendant's contract must in general be stated. (*Clarke* v. *Gray*, T. T. 1805, K. B., 6 East, 564).

thereafter, until the full amount was discharged, with interest. And it was further agreed that the 1*l.* per week should be paid to the defendant, who was authorized to receive the same for the plaintiff, as his trustee; and in default of G. G. paying the defendant the 1*l.* per week, he should forfeit the whole money which might be then paid, and the machine should be returned to the plaintiff. And afterwards, in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the said sum of 1*l.* per week for the machine from G. G., the defendant undertook and promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in the weekly payments to the plaintiff. On demurrer—

The Court held that the declaration, merely stating that the plaintiff was ready and willing to permit the defendant to receive the instalments, and to take the machine for his own use and benefit, without shewing that it was in the plaintiff's power to deliver it, was bad, no sufficient consideration for the defendant's promise being shewn.

WHITEHEAD *v.* GREETHAM, H. T. 1825. In Error. 1 *M'Clel. & Y.* 205; S. C. 2 *Bing.* 464.

Stating that the plaintiff retained the defendant to lay out £——; that defendant promised to lay it out securely; that the money was delivered to him for that purpose,—is sufficient after verdict.

A DECLARATION in assumpsit stated that the plaintiff had retained the defendant, at his request, to lay out 700*l.* in the purchase of an annuity; that the defendant promised to lay it out securely, and that the plaintiff delivered to him the money for the purpose. Breach, that the defendant laid it out improperly. On error, it was held that, after verdict, it must be taken that the promise was made upon that consideration; and if such consideration was insufficiently stated, it was only ground of demurrer, but not of error, or in arrest of judgment.

(*h*) MODE OF STATING THE PROMISE*.

PRICE *v.* EASTON, H. T. 1833. K. B. 4 *B. & Ad.* 433; S. C. 1 *Nev. & M.* 303.

A declaration, "in consideration that A. leaving a certain sum in the defendant's hands, he promised to pay the plaintiff," is insufficient,—it ought to state a promise "to the plaintiff to pay to him;"

IN assumpsit, the declaration stated that W. P. was indebted to the plaintiff in the sum of 13*l.*, being the balance of an account for a timber-carriage before then sold and delivered by the plaintiff to W. P., and at his request; and that the said W. P. being so indebted, the plaintiff, in consideration thereof, and in consideration that W. P., at the request of the defendant, would work for the defendant, and would leave the produce accruing of and from the work with the defendant, he, the defendant, undertook and promised the plaintiff to pay the plaintiff the said sum of 13*l.* balance for the said last-mentioned timber-carriage, provided the amount was earned by W. P., and left in the defendant's hands. There was an averment of performance and breach. On motion in arrest of judgment—

Per Cur.—We cannot, after a verdict, supply a necessary allegation; we can only intend all that is necessary to support the allegations that we find in the declaration. We think it quite clear that

* In indebitatus assumpsit, the statement of the promise is a material allegation, and the omission of it not cured by verdict. (*Hayter* v. *Moat*, 5 D. P. C. 298; abridged post, tit. *Executor and Administrator*).

the allegations in this declaration are insufficient. The first count only alleges a promise to pay the plaintiff,—not a promise to the plaintiff to pay him; and this cannot be intended.

JONES *v.* OWEN, T. T. 1836. K. B. 5 *Ad. & E.* 222.

Since the new rules, stating, in the common counts, that the defendant promised (not saying to the plaintiff), is good.

DECLARATION in assumpsit stated that the defendant was indebted to plaintiff in the sum of 20*l.*, for goods sold and delivered, and 20*l.* found due on an account stated; and in consideration thereof "promised to pay" the said monies respectively to plaintiff on request.

Lord *Denman*, C. J.—The declaration is in the form given by our own rules; we cannot call them in question, and independently of them it is good.

(*i*) MODE OF ALLEGING PERFORMANCE*.

VARLEY *v.* MANTON, M. T. 1832. C. P. 9 *Bing.* 363; S. C. 2 *M. & Scott*, 484.

Under a general demurrer, it cannot be objected that the averment of performance is not specific.

THE plaintiff declared, that on &c., at &c., by a certain agreement then and there made between the plaintiff and the defendant, the plaintiff agreed to make the defendant a three-horse-power portable threshing machine, to be worked by a four-horse works; to thresh from twenty to twenty-five quarters of wheat in a day; to put the new machine at Tanholt, where an old one then stood, in a complete workmanlike manner; and to take down, at the plaintiff's own expense, the old one then standing at Tanholt; the defendant to deliver the old machine at the plaintiff's yard at Peterborough, and also to fetch the new one to Tanholt; the old one to be taken by the plaintiff at 20*l.*, and the defendant to pay the plaintiff 30*l.* in exchange for the new one; the new machine to be put down in a complete working state in two months from the date of the agreement; that the plaintiff and the defendant then and there undertook, and faithfully promised each other respectively, to perform and fulfil the said agreement in all things; that the plaintiff, confiding in the said agreement and undertaking of the defendant, afterwards, and within the time mentioned in the agreement, at &c., made the three-horse portable threshing machine for the defendant, and did, within such time aforesaid, put up the new machine at Tanholt, in a complete wormanlike manner, and took down the old one at his own expense, and did then and there take the same at 20*l.* according to the provisions of the said agreement, to wit, &c. And although the said new machine was put down in a complete working state, within the time in that behalf mentioned, whereof the defend-

* A performance may be stated either by express averment, or implied from other allegations: the former occurs where the plaintiff expressly states in general terms that he has performed the agreement on his part, or shews specifically how he has fulfilled it; the latter are included in the ordinary allegations adopted in describing an executed consideration. When the consideration is executory, the performance must invariably be averred in the declaration; though, if the contract be stated by way of reciprocal agreement, the declaration need not in general shew that the plaintiff's part of it was performed or executed. It is, however, the usual practice, where the defendant's obligation to perform his part of the contract is altogether independent of, and unconnected with the plaintiff's performance of his part, or any other event, for the declaration, after stating the promise itself, without any intermediate averment or allegation, to proceed immediately to the assignment of the breach.

ant then and there had notice, and was then and there requested to pay the sum of 30*l.*, according to the tenor and effect of the said agreement, yet the defendant did not, nor would, when he was so requested as aforesaid, or at any other time, before or since, pay the plaintiff the said sum of 30*l.*, or any part thereof, &c. On general demurrer—

Per Cur.—The words of this averment of performance must be taken as they would strike any ordinary person. "According to the provisions of the said agreement," over-rides the whole of the preceding averments, and it would be a violent construction to confine it to the last member of the sentence. That brings the case within the rule, that where there is a general allegation of performance, if the other party wants a more specific averment, he must demur specially.

(*j*) Of the notice *.

(*k*) Of the request.

King *v.* Sears, E. T. 1835. Ex. 2 *C., M. & R.* 48.

The consideration inducing the defendant's promise need not be stated to be at the defendant's request, where executed†.

In assumpsit the declaration alleged, that one S. who had died intestate, was indebted at his decease to the plaintiff for arrears of rent, and had deposited, as a collateral security, a bill of exchange, drawn by him upon one I. F., accepted by him, and indorsed by the drawer to the plaintiff; that after his death, his widow continued to occupy the premises, and was in possession of goods on them that the plaintiff intended to distrain, and she was desirous of

* It is a general rule, that where the matter alleged in the declaration lies more properly within the privity and cognisance of the plaintiff than of the defendant, whether it be a condition precedent on which the performance of the latter's promise is altogether to depend, or it be only to regulate the extent to which it is to be performed, it is necessary for the plaintiff to allege, that the defendant had notice of the fact; and if the time, place, or other collateral incidents attending it be material, notice of them must be also averred. (See *Brable* v. *Hollywell*, Cro. Eliz. 250; Id. 834; 1 Roll. Abr. 464, pl. 21; *Richard* v. *Carmavel*, Holb. 68; S. C. 1 Roll. Abr. 462; Cro. Jac. 433; 1 Lev. 105). But where the matter alleged does not rest peculiarly within the privity and knowledge of the plaintiff, and the information is as accessible to the defendant as the plaintiff, no notice need be given or averred. Thus, if the defendant's contract to do a thing depend on the performance of an act by a stranger, an allegation of notice need not be introduced in the declaration, for it lies in the defendant's knowledge as much as the plaintiff's; (Com. Dig. Pleader, C. 75); or, if a promise be made upon a treaty of marriage by the father of the bridegroom to the father of the bride, to pay the bride so much in case of the husband's death, if she should survive him; the father of the bride dies, then the husband dies, and the administrator of the father declares upon this promise; it is not necessary to give or prove any notice of the death of the husband to his father. (Hardres, 42). So, in declaring on a promise to pay so much money at the full age of an infant, notice of the infant's attaining his full age need not be given. (Hardres, 42). The like of the marriage, on the day of the marriage of J. S. So, notice of absolution by the bishop need not be alleged. Where notice is necessary, it ought to appear that it was given in due time, and to a proper person. (Com. Dig. Pleader, 6, 73; 1 Leon. 123). It may be, however, useful to observe, that the allegation of a request in general implies notice of every thing purported by the request; but, to enable the request to be thus equivalent, it should be a special and not a general one, and attended by all those circumstances which should have accompanied the notice. (Cro. Eliz. 250; Cro. Jac. 228).

† When the defendant is chargeable upon a collateral promise to do an act upon request, the request must be stated in the declaration, and proved; (*Birks*

giving up the possession at the ensuing quarter-day, and of preserving her goods from the distress: whereupon, in consideration that the plaintiff would suffer her to quit the premises at that day, and would forbear to distrain, the defendant promised to pay part of the rent down, and the residue at the expiration of a year, the plaintiff giving up the bill of exchange. It was then averred that the plaintiff did permit the widow to quit without being distrained upon, and the breach alleged was, that though the plaintiff had offered to give up the bill of exchange, the defendant had refused to pay the rent. On demurrer—

The Court held, that if part only of the consideration alleged were shewn, it was sufficient to support the promise, and that an averment of the consideration moving the defendant to promise being made at the defendant's request, is only necessary in case of an executed consideration.

(*l*) Of the breach*.

HEAD *v.* BALDREY, T. T. 1838. K. B. 6 *A. & E.* 459; S. C. 2 *N. & P.* 217.

The breach must disclose what causes of action the plaintiff declares for, as the Court will not look to various parts of the record for a breach not assigned,

THE declaration alleged, that the defendant was indebted to the plaintiff for goods sold to the defendant, which sum being due and payable in consideration of the premises, and also that the plaintiff would sell and deliver to the defendant other goods, and also in consideration that the plaintiff would give time to the defendant for payment of the sum of money so due from him, the defendant promised to pay for the said goods, and the sum of money so due and owing as aforesaid, by accepting a bill, to be drawn by the plaintiff, at three months. Averments of performance by the plaintiff, by the sale and delivery of the goods, and giving time for payment; and that the plaintiff drew a bill for the aggregate amount so due as aforesaid upon the defendant. Breach, that the defendant refused to accept the bill, or to pay the whole or any part of that amount. On demurrer to the pleas.

Per Cur.—The Court cannot pick out of various parts of the record a different breach or cause of action from that for which the plaintiff proceeds; and, indeed, if it could, the present record would

v. *Trippet*, 1 Saund. 32); or, in any other case, where by the express or implied terms of the contract, it is incumbent on the plaintiff to request the defendant to perform his agreement. (*Bach* v. *Owen*, 5 T. R. 409; cited in *Bowdell* v. *Parsons*, 10 East, 359). Whenever a request is essential, the general averment, "although often requested," is not sufficient. (*Wallis* v. *Scott*, E. T. 1717, K. B.; 1 Stra. 88; S. P. *Frampton* v. *Coulson*, 1 Wils. 33; S. P. *Bach* v. *Owen*, 5 T. R. 409).

* The agreement upon which the suit is instituted creates the liability, the breach of the contract confers the right of action; hence the breach is the foundation of the suit, and must in all cases be stated in the declaration. (Com. Dig. Pleader, C. 44). The breach must be co-extensive with the promise. (*Wright* v. *Johnson*, 1 Vent. 64; S. C. 1 Sid. 440; S. P. *Anon.*, T. Jones, 125). And if the promise be to do one or the other of two things, the breach must be in the disjunctive. (*Gibbons* v. *Northcott*, 1 Sid. 447; S. P. *Anon.*, Hardres, 320). But it should not be too general. (*Best* v. *Yates*, 1 Vent. 268-9; S. C. 3 Keb. 449). Yet, if the terms of the breach be certain enough to enable the defendant to plead a former recovery, it suffices. (*Farrow* v. *Chevalier*, 1 Salk. 139; S. C. 1 Lord Raym. 478).

be imperfect, being in assumpsit, but containing no promise to pay for the goods, which are stated to have been delivered, and to be still unpaid for.

GWILLIM *v.* DANIELL, E. T. 1835. Ex. 2 *C., M. & R.* 61.

Under a contract to sell "all such naphtha as the defendant could make during two years, say — gallons per month"—Breach "for not delivering the difference," is bad.

BY a certain memorandum of agreement made between the defendant and the plaintiff, the defendant thereby agreed to sell to the plaintiff, and the plaintiff agreed to purchase of the defendant, all the naphtha that the defendant might make for and during the term of two years, say from 1,000 to 1,200 gallons per month. It was averred, that the defendant at various times, from the 1st of June, 1832, to the 1st of April, 1833, duly sold and delivered duly quantities, to wit, 3,000 gallons of the said naphtha, which the plaintiff duly purchased and accepted, and that he duly returned the packages, and performed the agreement on his part; and then it was alleged, that though the quantities of naphtha which the defendant ought to have made during this period, at the rate of from 1,000 to 1,200 gallons per month, amounted to a greater quantity than 3,000, to wit, to 10,000 gallons at the least; and though a reasonable time had elapsed for the sale and delivery of the remaining 7,000 gallons which the plaintiff was ready to purchase and accept; yet the defendant had not delivered the residue of the naphtha to the plaintiff, and he had lost the gains which he might have acquired by the rectifying of the same, and selling it at advanced prices. On demurrer—

The Court held, that the declaration could not be supported, the contract being for all the naphtha which the defendant's works might reasonably make, and it was consistent with the breach assigned, that the works were incapable of making more than had been actually delivered.

(*m*) OF THE DAMAGES.

DARTNALL *v.* HOWARD, T. T. 1825, K. B. 4 *B. & C.* 345; S. C. 6 *D. & R.* 438.

The declaration must allege a damage to the plaintiff resulting from the defendant's neglect or misconduct.

THE declaration alleged, that, in consideration that the plaintiff would retain and employ the defendants to invest a sum of money in the purchase of an annuity for the plaintiff, the defendants undertook to do their duty in the premises; that the plaintiff did retain and employ the defendants; that the defendants purchased an annuity for the plaintiff, but did not do their duty in the premises, but, on the contrary, took an insufficient security for the payment of the annuity, and that the defendants then and there had notice of all the premises. On motion in arrest of judgment—

Per Cur.—The declaration does not allege any damage to the plaintiff by means of the money being intrusted to and improperly invested by the defendants. Now, though it is stated that the grantor of the annuity was insolvent at the time it was granted, he may have acquired property since, and paid the annuity regularly.

GAINSFORD *v.* CARROLL, H. T. 1824. K. B. 2 *B. & C.* 624; S. C. 4 *D. & R.* 161.

THE plaintiff sued for damages against the defendants for not fulfilling a contract to supply him with bacon. Held, that the measure of damages was the difference between the prices agreed on at the time of making the contract and the market prices at the time it ought to have been completed.

The criterion of damages is at the time the contract ought to have been completed.

(*n*) AMENDMENT OF. See also, tit. *Amendment.*

WARD *v.* PEARSON, E. T. 1839. Ex. 7 *D. P. C.* 382; S. C. 5 *M. & W.* 16.

IN assumpsit the declaration stated the undertaking to erect a building and fit it up according to certain plans by a day stated, for the sum of 20*l.* Plea, non assumpsit, and that the agreement was rescinded. The contract proved was for the erecting certain seats, (for the coronation), to be completed four or five days before, &c., for the sum of 25*l.*, and it appeared that no plans were ever agreed upon.

An amendment allowed, if not material to the merits,

The Court held, that the Judge properly allowed the record to be amended according to the true contract, it not being material to the merits of the case.

BRASHIER *v.* JACKSON, T. T. 1839. Ex. 6 *M. & W.* 549.

IN this case the amendment sought to be made stated virtually a new contract and a new breach:—Held not within the stat. 3 & 4 Will. 4, c. 42, s. 23.

and does not in effect make a new contract.

---

2. *In an Indebitatus Assumpsit.*

(*a*) HOW CONSIDERATION TO BE STATED*. See also ante, p. 67.

(*b*) MUST SHOW A CAUSE OF ACTION †.

(*c*) MUST ALLEGE A REQUEST ‡. See also ante, p. 67.

(*d*) MUST ALLEGE A PROMISE §. See also ante, p. 68.

* The time of the consideration should be set forth with precision. (*Desborough* v. *Kelby*, 1 Ld. Raym. 533; 2 C., M. & R. 687; 2 C. & J. 418; 1 M. & W. 140. But see *Emery* v. *Fell*, 2 T. R. 28); but the sum mentioned in an indebitatus assumpsit is immaterial. (*Thompson* v. *Spencer*, E. T. 1767, K. B., cited in a note to *Bagnal* v. *Sacheverell*, Cro. Eliz. 292, edited by Leach).

† The subject-matter of the debt must be shown in the indebitatus count. (*Hibbert* v. *Courthorpe*, Carth. 276; S. P. *Dixon* v. *Willoughs*, 2 Salk. 446). And if it be so general as to leave it doubtful whether the debt was due by simple contract or specialty, the declaration is demurrable; (*Spark* v. *Jobber*, 2 Ld. Raym. 1451); and semble, not aided even by verdict. (*Palmer* v. *Stavely*, 12 Mod. 511).

‡ Semble, omitting to state that the cause of action arose at the request of the defendant is fatal after judgment by default; (*Hayes* v. *Warren*, E. T. 1736, K. B., 2 Stra. 933); and see rule, H. T., 2 Will. 4.

§ The allegation that defendant promised is essential. (*Lee* v. *Welch*, 2 Stra. 793; S. C. 2 Ld. Raym. 1516). And its omission is not aided even by verdict. (*Bedford* v. *Uffington*, Sid. 306; S. C. 2 Keb. 97). Though an express allegation that the defendant made the promise does not seem indispensable, unless it be a collateral promise. (*Symball* v. *Cooke*, 2 Keb. 715; S. C. cited 1 Lutw. 238). And saying that the plaintiff promised to pay himself is amendable after verdict. (*Bedford* v. *Uffingham*, 1 Sid. 306).

(*e*) Promise, how to be stated*.

XXI. RELATIVE TO THE PLEAS.

(*a*) In denial.

1. *General Issue.*

Hayselden *v.* Staff, M. T. 1836. K. B. 6 *N. & M.* 659; S. C. 5 *Ad. & E.* 153†.—S. P. Cousins *v.* Paddon, M. T. 1835. Ex. 2 *C., M. & R.* 547.

Where the defence shews a different contract than that declared on the general issue‡ is sufficient.

To a count in indebitatus assumpsit for work, labour, and materials, the defendant pleaded that the work was done and the materials provided in endeavouring to prevent a chimney of the defendant's from smoking, upon an agreement that the plaintiff should not be paid for unless the plaintiff succeeded in preventing the said chimney from smoking. On special demurrer—

Per Cur.—It must first be considered whether the defence set up in the plea could be given in evidence under the plea of non assumpsit; because, if it could not, then there is no ground for the demurrer. There is no doubt that it might be so before the new rules; because, not only might the fact of the actual contract itself have been denied, but it might also be shewn that it was void in law, or that the contract had been performed, or that the defendant was excused from the performance of it by many other circumstances. But since the new rules, (which rules have the force and effect of an act of Parliament), in actions of assumpsit the plea of non assumpsit is to operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. In actions of assumpsit for goods sold and delivered, the plea of non assumpsit is to operate as a denial of the sale and delivery in point of fact; and in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, must be specially pleaded. One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record; and in conformity with this object the case of *Edmunds* v. *Harris*, (2 A. & E. 414), was decided. That was an action of debt for goods sold and delivered, to

* The day on which the promise is alleged to have been made is unimportant. (*Coe* v. *Hawkins*, 1 Stra. 21; S. P. *Stafford* v. *Forcer*, 10 Mod. 312). The place at which the promise was laid was immaterial, nor could the defendant by his plea render it otherwise. (*Cole* v. *Hawkins*, 1 Stra. 21). And see rule H. T. 4 Will. 4.

† Questioning *Edmonds* v. *Harris*, 2 A. & E. 414.

‡ If nil debet instead of non assumpsit be pleaded, the plaintiff may sign judgment; (*Stafford* v. *Little*, H. T. 1737, C. P., Barnes, 257); or, if the plea of not guilty be adopted, advantage may be taken of the mistake by demurrer. (*Marsham* v. *Gibbs*, Ca. temp. Hard. 173; S. C. 2 Stra. 1022). In fact, it is a nullity (*Ivemy* v. *Farrant*, 1 D. P. C. 453) before verdict. (*Elrington* v. *Doshant*, 1 Lev. 142).

Where in assumpsit on a contract to sell and deliver best lead at a stated price, the amount to be taken out in prussiate of potash at a stated price, to which only non assumpsit was pleaded:—Held, that the defendant could not be allowed to show the inferiority of the lead to the price stated; to do so he should have pleaded the avoidance of the contract by the non-delivery of the lead according to the contract. (*Pegg* v. *Stead*, 9 C. & P., N. P., 637).

be paid for on request, (and which as to this is the same thing as indebitatus assumpsit), to which there was a plea of nunquam indebitatus; and at the trial the defendant proposed to prove that the goods were sold on a credit which had not expired when the action was brought, and on a question whether this defence was admissible on the general issue, the Court of King's Bench held that it was not, that it ought to have been specially pleaded, and that this was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor* v. *Hilary*, (1 C., M. & R. 741), on the ground, that, if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in the declaration, which was to pay on request; and so also in *Knapp* v. *Harding*, (1 Gale, Rep. 47), *Parke*, B., considered it as doubtful whether *Edmunds* v. *Harris* was properly decided. We think, therefore, that the case of *Edmunds* v. *Harris* cannot be considered as a binding authority; and if not, as the defence set up on this record shews a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is, that the money should be paid on a certain condition which has not been performed, it is not a contract to pay upon request, and therefore the defence might be gone into upon the general issue.

(*b*) In confession.

2. *As to Part, not shewing to what Part it applies.*

Mitchell *v.* Townley, M. T. 1837. K. B. 7 *Ad. & E.* 164.

In assumpsit, with counts on four causes of action, and one promise and breach. Plea, as to £——, parcel of the said several sums, &c., payment and acceptance in satisfaction of all the damages by reason of the non-performance of the said promises as to the said sum of £——. On special demurrer—

Plea as to £— parcel, &c. is good, without stating to what part it applies.

The Court held the plea good, although not stating to which cause of action it applied.

Noel *v.* Davis, M. T. 1838. Ex. 7 *D. P. C.* 48; S. C. 4 *M. & W.* 136.

The declaration contained several counts; a set-off of a bill of exchange was pleaded to a particular sum, parcel of the monies in the declaration mentioned. Special demurrer, assigning for cause (amongst others), that the plea did not sufficiently state against how much of the money in each or either of the counts of the declaration the set-off was pleaded.

And the same rule applies to a plea of set-off of a bill of exchange.

Per Cur.—We think it would be extremely inconvenient to tie the defendant up to shew to what particular count he applies his set-off. The plaintiff may withdraw his demurrer and reply.

---

2. *Payment of Money into Court.*

Meager *v.* Smith, E. T. 1833. K. B. 1 *N. & M.* 449.

Assumpsit for work and labour, and the money counts. Payment of money into Court to the amount of 10*l.* generally. It appeared that the plaintiff, who was a ship-builder, was employed by

Payment of money into Court admits

the special count on which it is paid*.

a person of the name of Mills (the defendant's colliery agent) to do some repairs to a ship, the Auguste Virginie; and the plaintiff agreed to do the repairs necessary to send her to sea at the sum of 60*l.* or 70*l.*—10*l.* under or over. It appeared that the ship in question belonged to Messrs. Gautier and Dubois, merchants at Brest, for whom the defendant shipped coals. *Bolland*, B., left it to the jury whether there was any authority given to Mills by the defendant, and a verdict was found for the defendant. A rule had been obtained in a former term, calling on the defendant to shew cause why that verdict should not be set aside, and a new trial had; and it was submitted that the payment of money into Court was an admission of the cause of action.

Per Cur.—Payment of money into Court on a special count admits the contract stated in that count. If it be paid in on the general counts, it admits a liability to the extent of the sum paid in, and to that extent only.

HODGES *v.* LORD LITCHFIELD, E. T. 1832. C. P. 9 *Bing.* 713; S. C. 3 *M. & Scott*, 201.

In an action on a contract for unliquidated damages, money could not be paid into Court†.

A RULE calling upon the plaintiff to shew cause why the defendant should not be at liberty to withdraw his plea of general issue, and pay money into Court on the first count of the declaration.

Per Cur.—The defendant will not be allowed to pay money into Court, unless the sum sought to be recovered is certain, or such as can be ascertained by mere computation. When the demand is in the nature of unliquidated damages, such payment will not be permitted.

STARTUP *v.* CORTAZZI, E. T. 1835. Ex. 2 *C., M. & R.* 165.

Where an action was brought for not delivering goods according to contract, money was paid into Court; the plaintiff took it out:—Held, that the jury might find for the defendant.

IN assumpsit for non-delivery of linseed, pursuant to a contract of sale, the plaintiffs proved that they had paid part of the purchase-money to the vendors in advance, which had not been returned, but had been paid into Court, with interest up to the time so paid in, as a condition for a commission to examine witnesses abroad, and was only received by plaintiffs a short time before trial.

The Court held, that, in estimating the amount of damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial; and that, as the plaintiffs did not prove any special damage from the non-delivery of the seed and the non-repayment of money, the verdict was not wrong, where the jury considered that the plaintiffs had been satisfied by the payment of the purchase-money and simple interest upon it, and of the difference between contract price and the price at the time stipulated for the delivery.

(*c*) IN AVOIDANCE.

1. *By Common Law.*

CORNFOOT *v.* FOWKE, E. T. 1839. Ex. 6 *M. & W.* 358.

Plaintiff's agent let a house.

IN an action for refusing to perform a contract for the taking of a furnished house; plea, that the defendant was induced to enter into

* And no objection can be taken as to non-joinder after payment into Court. (*Walker* v. *Rawson*, H. T. 1833, N. P., 1 M. & Rob. 250).

Under a plea of payment of money into Court, the defendant cannot shew that the order as to the residue of the goods was countermanded. (*Stevens* v. *Ufford*, H. T. 1835, N. P., 7 C. & P. 97).

† But see the 3 & 4 Will. 4, c. 42.

it by fraud and misrepresentation. It appeared that the agreement was made with the plaintiff's agent; who, to a question whether there was any thing objectionable about the house, replied "that there was no objection whatever." It being proved that the plaintiff knew of the adjoining house being a brothel—

Plea, fraud and misrepresentation, because a brothel was next door:—Held, to avoid the contract, it must be shewn that the agent knew of the fact*.

The Court held, (diss. Lord *Abinger*), that it was necessary to shew the representation to have been fraudulently made; and the agent not knowing of the objection, and the misrepresentation not being embodied in the contract, the circumstances did not constitute fraud sufficient to support the plea.

GOWER *v.* VON DEDALZEN, E. T. 1837. C. P. 3 *Bing. N. S.* 717.

Assumpsit on a contract for not accepting oil "of good and merchantable quality;" plea, "that the casks were not good and merchantable," is bad.

IN an action for not accepting Gallipoli oil according to a contract, by which the plaintiffs agreed to deliver, and the defendants to accept, a cargo; viz. 248 casks of good merchantable Gallipoli oil. Plea, that said casks, containing said oil in said agreement and declaration mentioned, were not, at the time of the making of said agreement and promise in the said declaration mentioned, or at the time of the arrival of said vessel at Plymouth, or at the time plaintiffs tendered and offered to deliver and leave with defendants said bill of lading of said cargo as in said declaration mentioned, well seasoned or proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms, and within the true intent and meaning of said agreement in said declaration mentioned; but, on the contrary thereof, were badly seasoned, and unfit and improper casks for the purpose of containing such oil, as in said agreement mentioned; wherefore defendants did not nor would take, accept, or receive the said bills of lading and cargo at Plymouth, and did not nor would direct said vessel, with said cargo, to any one of the ports in the said agreement mentioned, and neglected and refused to pay to plaintiffs for said cargo said price; concluding with a verification. Special demurrer and joinder thereon. The Court held the plea bad, inasmuch as it did not allege that the article itself was injured or deteriorated in value; and it went not to that which was essential, but to that which was mere matter of form and description, viz. the mode of conveyance.

EDWARDS *v.* CHAPMAN, H. T. 1836. Ex. 1 *M. & W.* 231; S. C. 4 *D. P. C.* 732.

So, to an action for goods sold, a plea, merely stating it was agreed that the

To a declaration in assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered upon a certain contract, and that afterwards it was agreed between the plaintiff and defendant that the said contract should be wholly re-

* In an action on an agreement in which fraud is pleaded, the plea is not supported unless some wilful misrepresentation should have been made. (*Stevens* v. *Webb*, T. T. 1835, N. P., 7 C. & P. 60). In assumpsit on an agreement to pay to the plaintiff a sum in consideration of the plaintiff using his influence and securing an appointment to the defendant: pleas, alleging, first, that the plaintiff had procured the agreement through fraudulent representation; and secondly, that the appointment was not in fact obtained and secured by the influence of the plaintiff:—Held, that upon the first plea the issue was, whether the representation was false to the knowledge of the plaintiff at the time; and on the second, if the jury were satisfied, upon the evidence, that the plaintiff had used such influence as that the situation was secured by it. (*Neeley* v. *Lock*, T. T. 1838, N. P., 8 C. & P. 527).

contract should be rescinded, is bad.

scinded and annulled. On demurrer, *Parke*, B.—A debt arises from the contract of sale, which cannot be got rid of without an accord and satisfaction.

Per Cur.—Judgment for the plaintiff.

---

2. *By Statute.*

FENWICK *v.* LAYCOCK, M. T. 1840. Q. B. 1 *Gale & D.* 27.

The illegality of a contract must be pleaded.

IN this case the Court held, that a defendant cannot take advantage of the illegality of the contract, without specially pleading it, whether such illegality appear in the evidence given on the part of the plaintiff or defendant.

(*g*) REPLICATIONS, REJOINDERS, ETC., ARE ARRANGED UNDER THE TITLES TO WHICH THEY ARE RESPECTIVELY APPLICABLE.

WHITTAKER *v.* MASON, T. T. 1835. C. P. 2 *Bing. N. S.* 359; S. C. 2 *Scott*, 567.

To a plea that the contract was controlled by the custom of the trade, the plaintiff cannot reply de injuriâ.

DECLARATION in assumpsit, on a contract for goods sold upon certain stated conditions. Plea, that the sale was controlled by a custom of trade, concluding with a verification. Replication, that the plaintiff committed the breach of promise in the first count mentioned de injuriâ, &c.

The Court held, that, even if such replication were applicable in assumpsit, yet, as the plea contained no matter of excuse, the replication was informal and insufficient. Held, also, that, it not appearing on the record that the contract was in writing, the plea alleging a different contract was substantially good, although it might have been bad on special demurrer, as amounting to the general issue.

XXII. RELATIVE TO THE EVIDENCE.

(*a*) IN GENERAL.

ROUTLEDGE *v.* GRANT, E. T. 1828. C. P. 4 *Bing.* 653; S. C. 1 *M. & P.* 717; S. C. 3 *C. & P.* 267.

In an action for not completing a contract, the evidence must be co-extensive with the declaration*.

IN an action for not accepting a lease for twenty-one years according to agreement, the plaintiff, in some counts of his declaration, stated "that he was possessed of a house for a certain term of years, to expire on the 25th December, 1856;" and on others, "that he was entitled to the term, under and by virtue of a certain con-

* Where negotiations, at first merely parol, are afterwards reduced into writing, the Court must look to the writing as shewing the final agreement, and will not afterwards allow questions to be put to ascertain whether other matters were not previously mentioned besides those which were eventually reduced into writing. (*Sinclair* v. *Stevenson*, 1824, N. P., 1 C. & P. 582).

Where notice had been given to the defendant to procure a contract in the hands of a third party holding it for the defendant, and the other party to the contract:—Held, that, having only a right to inspect, but not to the possession of the document, the holder ought to have been subpœnaed, and that secondary evidence of it was inadmissible. (*Parry* v. *May*, 1833, N. P., 1 M. & Rob. 279).

In an action for work and labour, when the plaintiff has established a quantum

tract;" and it appeared in evidence that he was only possessed of a term of twelve years, and he failed in proving that he was entitled to any further term under any contract; although it was found that he did afterwards obtain a term such as that described in the declaration.

The Court held, that the variance was fatal. The first and third counts alleged, that, at the time of the agreement, the plaintiff was possessed of a term to expire on the 25th of December, 1865; the second, that he was entitled, under and by virtue of a certain contract, to a certain term, to wit, a term of thirty-two years from the 25th of December, 1824; whereas the evidence shewed, that at the time mentioned, his whole interest consisted of a term of twelve years only. Although it might not have been necessary for the plaintiff to aver the precise interest of which he was possessed, it was at least incumbent on him to shew that he was possessed of such term as would have enabled him to carve out of it the term he had agreed to sell to the defendant. All the counts were framed on the supposition of the plaintiff's having a certain existing interest in the premises. The evidence given failed in establishing this. The variance, therefore, was one of substance, not of mere form.

WRIGHT *v.* CROOKES, M. T. 1840. C. P. 1 *Scott, N. S.* 685.

IN an action on the case for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would have been had she been built of the materials described, it appeared that such representations having been made by an agent, without any express authority from the defendant—

The rule, that parol evidence cannot be received to control a written contract*, does not preclude parol evidence, shewing that the party was induced to sign by fraud;

The Court held, although the terms of a written contract cannot be varied by parol, yet if one party is induced to enter into the contract by the false representations of the other, it is competent to him to prove it by evidence aliunde; and where the representations were made by the defendant's father, held that it was properly left to the jury to say whether or not such representations were made with the previous sanction and authority of the defendant.

GROUNSELL *v.* LAMB, E. T. 1836. 1 *M. & W.* 352.

IT appeared that the plaintiff was a machine maker, and had supplied to the defendant a turnip-cutting machine for the price of 33*l.* It was proposed by the defendant to shew, that, according to the agreement between the parties, if it would not perform its work it was not to be paid for, and that, in point of fact, it did turn out

and may be given to shew that a contract was conditional;

meruit, if the defendant's witnesses prove the existence of a written contract, and the plaintiff insist on the defendant's producing it, and it is not produced, the plaintiff must be called; but if the plaintiff does not require its production, the case may proceed. (*Damer* v. *Langton*, 1824, N. P., 1 C. & P. 168).

* This does not apply to shewing that, after the making of the contract, the parties agreed to extend the time of performance; (*Cuff* v. *Penn*, 1 M. & S. 21); but parol evidence cannot be admitted to explain an agreement, unless there is some latent ambiguity in its terms. (*Coker* v. *Guy*, 2 B. & P. 565). As the general rules relative to agreements and contracts have only been considered under this head, and the evidence which is to be given as to contracts in general applies not only to agreements in particular cases, but to bonds, covenants, deeds, &c., it will suffice to refer to the title of *Evidence*, where all the cases on this subject will be collected and abridged. To prove that a contract has existed and been abandoned, the specific contract must be proved. (*Walker* v. *Constable*, 1 B. & P. 306).

to be worthless, though it did not appear to have been returned. It was objected, that this defence ought to have been specially pleaded.

Parke, B.—The evidence shews that the plaintiff could not recover on the contract originally entered into between the parties, and no new contract is proved. It was not necessary to plead this defence specially. The evidence merely goes to shew the contract was conditional.

BROAD *v.* M'CALMAR, M. T. 1835. K. B. 5 *N. & M.* 413.

or, to shew the nature of the original contract;

ASSUMPSIT for commission, on procuring a charter-party. Plea, payment of half the sum demanded into Court, and non assumpsit as to the rest. The plaintiff proved the procuring of the charter-party, and that the usual rate of commission payable was 5*l.* per cent., whether the ship-owner abandoned the contract or not. The defendant proved a conversation with the plaintiff, subsequent to the procuring of the charter-party, in which, as the ship-owner was unable to procure an outward cargo, and had, therefore, abandoned the contract, the plaintiff agreed to accept $2\frac{1}{2}$*l.* per cent., instead of 5*l.*

The Court held, that this evidence was receivable, not as shewing a new contract, in which case it would not have been admissible, but as shewing what the original contract was between the parties, in case of the defendant not being able to procure an outward cargo, and therefore abandoning the charter-party.

BOTTOMLEY *v.* FORBES, M. T. 1838. C. P. 5 *Bing. N. S.* 121; S. C. 8 *Scott*, 866.

or, where the meaning of a mercantile contract is doubtful, the usage of the trade is admissible to explain it*.

IN a charter-party to pay so much a ton for cotton shipped at Bombay for London, to be calculated at fifty cubic feet per ton; nothing was said as to the place where the measurement was to be made:—Held, that the defendant might call witnesses as to the usage at the port of Bombay, of packing cotton by means of a screw, so as to compress a greater into a less space.

The Court held also, that it was competent to the plaintiff to produce witnesses in reply, for the purpose of proving such facts as would shew the alleged usage to be unreasonable, and that it was not acted upon by the parties; and that such evidence need not be given at first as a part of the plaintiff's direct case.

SOULBY *v.* PICKFORD, H. T. 1829. C. P. 2 *M. & P.* 545.

A claim for work and labour was proved—the defendant then established a special contract—the plaintiff cannot after-

IN an action for work and labour in printing, the case was opened on the quantum meruit, concealing that there was a special contract; after which the defendant proved that the plaintiff agreed to do the work at a certain sum, when the plaintiff proposed to shew the special contract, which was different from that set up by the defendant.

The Court held, that he could not be permitted to abandon the

* Where the contract (a sold note for hops) was expressed in short terms, as, "pot. at 100*l.*":—Held, that parol evidence was admissible to explain either that the price meant per cwt., or what was meant by the term "Pocket." (*Spicer* v. *Cooper*, 1 Gale & D. 52).

cause of action first relied on, and resort to that which he ought to have set up in the first instance, nor be allowed to impeach that proved by the defendant.

wards prove a different special contract;

FIELDER *v.* RAY, M. T. 1829. C. P. 3 *M. & P.* 659; S. C. 6 *Bing.* 332; S. C. 4 *C. & P.* 61.

IN an action for work and labour, after the plaintiff's case was closed, the defendant offered in evidence a written contract, which, it was alleged, contained the terms of the dealing between the parties, and differed from the case proved by parol testimony for the plaintiff; but, it being unstamped, he was not allowed to produce it. On a motion for a nonsuit, on the ground that the written instrument, containing the terms of the contract, was part of the plaintiff's case, and ought to have been produced by him, being the best evidence of the contract, or for a new trial—

Per Cur.—It appeared on the defendant's evidence, that there was some contract reduced into writing, having a relation to the cause of action, which, it was contended, that the plaintiff ought to have produced as part of his case. This written instrument not being stamped, the defendant was not permitted to produce. On the best consideration we have been able to give to the case, we think it was incumbent on the defendant to prove the existence of this memorandum by shewing it, being properly stamped. It has been contended, that, if it be shewn that the contract which the plaintiff seeks to enforce has been reduced into writing, it makes no difference whether this appears on the cross-examination of the plaintiff's witnesses, or by the evidence of the defendant. But the difference we take to be this:—if it appear on the evidence of the plaintiff that there is a written contract, the absence of that writing is a defect which he is bound to supply; whereas, when it appears by the parol evidence of the defendant, the defendant is bound to substantiate his objection, by the production of the instrument; otherwise there would be this inconvenience—a plaintiff might be nonsuited on the mere assertion of a witness, that there was an agreement in writing touching the subject-matter of the action, when, if produced, it might appear to be perfectly consistent with the plaintiff's case. As, however, the agreement, if produced, might have a considerable bearing on the case, the defendant should have an opportunity of producing it; we, therefore, think that there should be a new trial, on payment of costs. Rule absolute accordingly.

but where, after the plaintiff had closed his case, it appeared there was a written contract, not produced, not being stamped:—Held, that the mere assertion of the defendant, that there was such a contract, was not sufficient to nonsuit the plaintiff.

REID *v.* BATTE, M. T. 1829. N. P. *M. & M.* 413.

IN assumpsit, it appeared that the plaintiff engaged to perform works under a written contract, during which a separate order was given for other works; the question was, which side should produce the contract; after some discussion it was read by consent by the plaintiff.

Per Lord *Tenterden*, C. J.—If work be done under a written contract, and a separate order for *other* work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work.

Where, after a written contract is entered into, a verbal order is given for extra work, the written contract need not be produced.

XXIII. RELATIVE TO THE INSPECTION OF THE CONTRACT.

CHARNOCK *v.* LUMLEY, M. T. 1838. C. P. 5 *Scott*, 438.

In an action for money had and received founded on a contract, inspection was granted.

THIS was an action for money had and received founded on an agreement. On motion for leave to inspect the contract—

The Court said, as the action for money had and received was founded on the agreement, they would allow inspection.

XXIV. RELATIVE TO STAYING PROCEEDINGS.

CARNE *v.* LEGH, M. T. 1826. K. B. 6 *B. & C.* 124.

If separate actions be brought where the defendants might be sued jointly, and one defendant pay, proceedings against the others will be staid without costs.

THE plaintiffs had commenced separate actions against the defendant and two other persons for the same demand, for which they were (if at all) jointly liable, and the debt and costs in one of the other actions had been paid. On motion to stay proceedings, without costs—

The Court said, this being a joint debt, the plaintiffs were at liberty to sue all the debtors together, or any one separately, leaving him to plead in abatement; but he had no right to sue all the parties separately for one and the same demand. The rule must be made absolute.

XXV. RELATIVE TO A VIEW IN ACTIONS ON CONTRACTS.

NEWHAM *v.* TAITE, T. T. 1838. C. P. 6 *Scott*, 574.

No view granted under a building contract.

IN an action on a contract for building a chapel, the plaintiff applied for a view of the premises with his witnesses—

Per Cur.—This application is very unusual; we cannot grant it; if any authority can be produced, the case may be mentioned again. Rule refused.

XXVI. RELATIVE TO WHO TO BEGIN IN ACTIONS ON CONTRACT.

STEINKELLER *v.* NEWTON, M. T. 1838. N. P. 9 *C. & P.* 313.

To an action on a contract, plea, fraud:—Held, that defendant must begin*.

TO an action to recover damages for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter within certain specified times, the defendant pleaded—first, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation; and secondly, that he would have delivered the spelter within the times specified, but was hindered from doing so by the fraud, &c., of the plaintiff.

* But in assumpsit on a building agreement, the issue being, whether it was executed according to the specification:—Held, that the plaintiff was to begin. (*Smith* v. *Davies*, 1836, N. P., 7 C. & P. 307). So, in assumpsit for not delivering hay of certain quality, plea, that defendant tendered hay of that quality, and

Tindal, C. J., was of opinion, that, as the defendant had pleaded fraud and covin, he was entitled to begin; and the plaintiff might afterwards, if the defendant failed in making out his case, go into evidence of the damage sustained by him in consequence of the breach of contract.

XXVII. RELATIVE TO THE DAMAGES.

Randal *v.* Everest, H. T. 1827. N. P. *M. & M.* 41; S. C. 2 *C. & P.* 577.

In an action for breach of contract, the jury must decide the amount of damages, the words, "penalty" or "liquidated damages," make no difference.

An agreement not under seal, for the lease of a public-house, contained a clause, that the party neglecting to comply with his part of the agreement should pay the sum of 100*l.* mutually agreed upon to be the damages ascertained and fixed on breach thereof. In assumpsit a question arose as to the criterion of damage—

Abbott, C. J., said,—A great deal has been said about the different import of the terms *penalty and liquidated damages;* but I am of opinion, and shall always hold so until compelled by a higher authority to say otherwise, that, whether the term *penalty* or *liquidated damages* be used in the agreement, a party who claims compensation for a default shall only be allowed to recover what damage he has really sustained. Whatever language the parties may choose to use, I am of opinion, in point of law, that a jury cannot be called upon to give more damage than the party has really sustained.

See 2 *B. & P.* 346; 6 *Bing.* 141; 6 *B. & C.* 216; *Holt, N. P.* 43, *n.*

Philpotts *v.* Evans, M. T. 1839. Ex. 5 *M. & W.* 475.

The criterion of damages for not accepting goods, is the difference between the price at the day of the sale and the market-price at the time of the tender and refusal.

A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof;" and, subsequently, (the market having fallen), gave the seller notice that he would not accept it if it were delivered, the wheat being then on its transit to Birmingham. In an action against A. for not accepting the wheat—

The Court held, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to him for acceptance at Birmingham, and refused, and not on the day when the notice was received by the seller.

Laird *v.* Pyne, M. T. 1840, Ex. 8 *D. P. C.* 860.

And in an action for breach of

The first count of the declaration was, upon an agreement for the sale of a large parcel of land belonging to the plaintiff, and contained

that plaintiff refused to receive it:—Held, that being a traverse of an allegation in the declaration, the issue lay on the plaintiff. (*Crowley* v. *Page*, 1837, N. P., 7 C. & P. 789). And in assumpsit for breach of contract to do certain work in a workmanlike manner, and issue whether the work was so done:—Held, that the plaintiff was to begin. (*Amos* v. *Hughes*, 1835, N. P., 1 M. & Rob. 464). The test is, whether, if the particular allegation on which the issue arises be struck out of the plea, there will or will not be a defence to the action, and not merely whether the allegation be affirmative or negative. (*Mills* v. *Barber*, 1 M. & W. 427).

contract in purchasing land, the damages are not the purchase-money, but the actual damage.

averments of the plaintiff's readiness and willingness to shew a good title, and to execute proper conveyances according to the agreement; but that the defendants refused to complete the bargain, and discharged the plaintiff from performance. There were also counts for use and occupation, goods sold and delivered, and for money due on an account stated. It was submitted on the part of the plaintiff, that with reference to the first count, the jury ought to give damages to the amount of the purchase-money, in addition to interest upon it, but *Rolfe*, Baron, ruled, that the plaintiff was entitled upon the first count to damages only for the non-fulfilment of the bargain, and that the amount of the purchase-money and interest was not the true measure of damages upon the whole declaration. On motion to increase the damages—

The Court refused the rule; as the measure of damage is not the amount of the purchase-money, but only such damage as the plaintiff has actually sustained by the breach of contract.

See 5 *B. & A.* 835.

XXVIII. RELATIVE TO THE JUDGMENT AND COSTS*.

GORBELL *v.* ARCHER, H. T. 1835. K. B. 2 *Ad. & E.* 500.

Declaration contained a special count and common counts; the plaintiff succeeded on one of the latter counts, but on a special case defendant had judgment: the plaintiff is still entitled to the costs of it.

ASSUMPSIT. The declaration contained a special count founded on the conditions of sale by auction of the moiety of an estate sold by Mr. Mills, at the Auction Mart, to the plaintiff, and was adapted to recover the amount of the deposit paid, the moiety of auction duty and expenses of investigating a title which was found not to correspond with the interest proposed for sale. It also contained counts for money lent, money paid, and money had and received, for interest and on an account stated. The defendant pleaded the general issue; and at the trial before Lord *Denman*, C. J., a verdict was found for the plaintiff for the sum of 85*l.* 16*s.* 8*d.*, being the amount of the deposit and the moiety of the auction duty on the count for money had and received, and for the defendant on the special counts, subject to the opinion of the Court.

The Court said, the rule is, that where an action in assumpsit with a special count and common counts is brought, and the plaintiff succeeds on one of the latter, but the pleadings and facts are afterwards turned into a special case on which the defendant substantially succeeds on the whole of it, he is entitled to the costs, including those of the count on which the plaintiff succeeds.

* The judgment in favour of the plaintiff is, that he recover a specified sum assessed by a jury, or on reference to the Master, for his damages which he has sustained by reason of the defendant's non-performance of his promises and undertakings, and for full costs of suit to which the plaintiff is in all cases entitled in this action, though the damages recovered be under 40*s.*, unless the Judge certify under the 43 Eliz., c. 6.

Contribution.

(*See also ante, Vol. II.*, p. 573).

See tits.

Bail,	*Party-wall,*
Bankrupt,	*Principal and Surety,*
Executor and Administrator,	*Salvage,*
Guarantee,	*Sheriff,*
Insurance,	*Ship and Shipping,*
Partners and Partnership,	*Trustees.*

DAVIES *v.* HUMPHREYS, T. T. 1839. Ex. 6 *M. & W.* 153.

An action for contribution lies as soon as a party has paid anything beyond his proportion.

A., B., and C. entered into a joint and several note for payment of a sum, with interest; and A. having been called upon and paid the amount, brought two actions; one against B., as the principal, for the whole amount, and another against C., as his co-surety for B.

The Court held, first, in the action against B., that an indorsement by the payee (since deceased) of the receipt from A., to which was added, "the £—— having been originally advanced to B.," was admissible to prove not only the payment by the plaintiff, but the original advance to B. as the principal; secondly, that, as the right of action against the co-surety for contribution attached upon the payment by the plaintiff of anything beyond his proportion, he could recover only what he had paid beyond that proportion within the six years.

See 2 *B. & P.* 268; 6 *Ves.* 5; 8 *A. & E.* 136; *S. C.* 3 *N. & P.* 248.

HOLMES *v.* WILLIAMSON, H. T. 1818. K. B. 6 *M. & S.* 158.

If the inhabitants in vestry authorize a prosecution, one who pays the costs may sue for contribution*;

AFTER an agreement by the inhabitants in vestry to prosecute a party for encroachments, a committee had been formed, who retained an attorney, and a judgment was obtained; the attorney having sued the plaintiff for the amount of his bill, and recovered it, with costs of the action, against the plaintiff, one of the committee—

The Court held that he might recover contribution from the others as for money paid.

WILSON *v.* CUTTING, H. T. 1834. C. P. 10 *Bing.* 436; S. C. 4 *M. & Scott*, 268.

so, a party who joins another in a trading voyage may sue for contribution after settlement of the accounts;

A. AND B. were interested as partners in a certain voyage; upon the completion of which, and the final adjustment of the partnership accounts, a larger sum than that to which B. was entitled was awarded to him, in consequence of his undertaking to pay a certain debt due by the partners. Upon non-payment by B., A., being compelled to discharge the amount, brought an action to recover the sum of 62*l.* 5*s.*, which he had, as he alleged, paid for the use of the defendant.

Per Cur.—These two persons, the plaintiff and defendant, entered into a partnership of profit and loss, with respect to a certain

* Where a testator devised three leasehold estates to different parties, one being charged with a mortgage which he directed to be paid out of his residuary estate, which proved insufficient for that purpose:—Held, that the devisee took it subject to that burthen, and could not call upon the devisees of the other estates to contribute ratably. (*Halliwell* v. *Tanner*, 1 Russ. & M., Ch., 633).

voyage, upon the conclusion of which they came to a final settlement and adjustment; and the question is, whether one has a right to bring an action against the other for any debt or claim which he might have, arising out of such voyage. One of the parties, the defendant, charged himself in the settlement with the payment of 62*l.* 5*s.* expenses, &c., arising out of such voyage; and upon the strength of such settlement he received from the plaintiff the sum of 24*l.* 8*s.* 4*d.* This arrangement, it should be recollected, was entered into upon that which was described as the final settlement of the said ship's accounts; and in consequence of such arrangement, the defendant debited himself with the above-mentioned sum, which he was, by his agreement, to pay to the broker. Now, he has either done so—he has either paid the broker, or he has not; if he *has* paid him, there is an end to the matter; if he has not, it cannot be denied that, by his agreement, he was bound to do so; and the consequence of his failure has been, that the plaintiff was obliged to discharge the debt. The result of the agreement between the parties is, that the matter is taken out of the partnership concern; and the right of the plaintiff to recover against the defendant is placed on such a footing as if there was no partnership at all.

---

but a partner cannot sue his co-partner for contribution of money paid in a joint action.

SADLER *v.* HICKSON, H. T. 1834. K. B. 3 *N.* & *M.* 258.

IN an action for contribution, it appeared that the plaintiff and the defendant, jointly with another person, had carried on business; and that, an action having been brought against the three for the repairs of premises on which the business of the partnership was carried on, the plaintiff in that action had recovered; and upon the judgment against the three, execution had been had against Sadler for the debt and costs, which he had paid, and for a proportion of which he now brought this action against the defendant. Upon this, *Denman*, C. J., nonsuited the plaintiffs. On motion to set the nonsuit aside—

Per Cur.—The question was, whether, where, one of three partners, against whom a joint judgment was recovered, was arrested, and paid the debt and costs, he could maintain an action for contribution against his co-partner. It was admitted that, if the payment were voluntary, he could not; but it was contended that, where the sum was paid under compulsion, he could. We see no ground for acknowledging the distinction to exist. Rule refused.

So, one of several stage-coach co-proprietors cannot sue another for contribution*.

PEARSON *v.* SKELTON, T. T. 1836. Ex. 1 *M.* & *W.* 504; 1 *T.* & *G.* 848.

ONE of several stage-coach proprietors had been sued for damage by negligent driving of their servant. It appearing that there was a partnership fund, out of which the expenses were to be first paid, and the residue divided—

The Court held, that an action for contribution could not be supported by the one who had paid the damages against his co-proprietors.

* But if a party recover damages in case against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened. (*Wooley* v. *Batte*, 1826, N. P., 2 C. & P. 417).

GROVER *v.* HEATH, M. T. 1833. Ex. 2 *D. P. C.* 285.

Where A. and B. employ an attorney, A. pays the whole, and sues B. for contribution:—Held, that B. was entitled to have the attorney's bill taxed.

THIS was an action of assumpsit by the plaintiff, as surviving partner of Grover and Pollard, bankers, Hemel Hempstead, for money paid to Grover, Smith, & Grover, as a moiety of their bill of costs as attornies for the defendants in *King* v. *Giles*, (8 Price, 293), and *Giles* v. *Grover*, (1 Y. & Jer. 232), under an agreement to pay the same by the defendant. In February, 1833, the plaintiff made an application to the defendant for payment, issued a writ of summons in April, and declared in June. The defendant then applied to a Judge at chambers to refer the bill of costs to the Master to be taxed; but the Judge refusing to make an order in the vacation, the defendant paid the amount of the bill into Court, objecting to pay the interest, which was also demanded by the plaintiff. On application to the Court to order taxation—

The Court held, that, where one of several liable to contribute paid the attorney's bill, and afterwards sued the defendant for his share, he was still entitled to have the bill taxed.

ADAMSON *v.* JARVIS, H. T. 1827. C. P. 4 *Bing.* 66; S. C. 2 *Moore*, 241.

The rule that wrong-doers cannot have contribution does not apply to a party who is innocent of the wrong.

Per Cur.—In *Phillips* v. *Biggs*, (Hardres, 164), in a bill against the defendant, as executrix of her husband, to have contribution, the case was, that the plaintiff and testator were sheriff of Middlesex; that there had been a recovery against the former for an escape, in the testator's lifetime, and 500*l.* damages recovered, which the plaintiff had paid and satisfied, to which the bill suggested the defendant ought to contribute; but the Court doubted, and compared it to the case of two joint obligors; but it did not appear that that case was ever decided. The principle to be deduced from all the authorities is, that where two persons knowingly do a wrong, the one cannot recover contribution from the other; but that does not apply where one party misleads another, who is innocent.

See 8 *T. R.* 186; 1 *Campb.* 343; 2 *Ad. & E.* 57; 2 *C. & P.* 417; 1 *M. & W.* 404.

TAYLOR *v.* COHEN, H. T. 1827. C. P. 4 *Bing.* 53; S. C. 12 *Moore*, 219.

A party who has paid his contribution is a competent witness.

THE defendant, among other creditors, agreed to certain resolutions, to watch a commission supposed to be fraudulent, and contribute "in the usual way."

The Court held, that parol evidence might be resorted to to explain the meaning of that expression—viz. that each creditor should contribute in proportion to his claim against the bankrupt, and that they thereby did not become responsible for each other's contribution, they were, therefore, not joint contractors, and one, having paid his contribution, was a competent witness.

Conusance.

I. IN WHAT CASES CONUSANCE MAY BE CLAIMED, p. 88.

II. BY WHAT COURT IT MAY BE CLAIMED, p. 88.

III. BY WHAT PERSONS IT MAY BE CLAIMED, p. 88.

IV. TIME AND MANNER OF CLAIMING CONUSANCE, p. 88.

V. PLEA OF CONUSANCE, p. 89.

I. IN WHAT CASES CONUSANCE MAY BE CLAIMED*.

II. BY WHAT COURT IT MAY BE CLAIMED †.

III. BY WHAT PERSONS IT MAY BE CLAIMED ‡.

* Claim of conusance is defined to be an intervention by a third person demanding judicature in the cause against the plaintiff who has chosen to commence his action out of the claimant's court. (See Gilb. C. P. 192; 1 Sellon, ch. 7; Bac. Abr. *Courts*, D. 3; 2 Wils. 409; Willes, 233). It is in form a question of jurisdiction between the two courts; (see Fortesc. Rep. 157; 5 Vin. Abr. 588); and not between plaintiff and defendant, as in the case of a plea to the jurisdiction, and therefore it must be demanded by the party entitled to conusance, or by his representative. (See Fortesc. Rep. 157; 5 Vin. Abr. 588; 12 Mod. 666). A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney. (See 2 Wils. 410; 5 Vin. Abr. 599).

† According to 5 Vin. 569, there are three sorts of inferior jurisdictions:—the first to hold pleas, which is merely a concurrent jurisdiction, and can neither be claimed nor pleaded; the second is a general conusance, which, being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant; the third is a conusance of pleas with exclusive words, as where the King grants to the city, that the inhabitants shall be sued within the city and not elsewhere. This being an exempt jurisdiction, may be either claimed or pleaded. (See Br. tit. *Conusance*, 58; 1 Blac. Rep. 197; and *Cross* v. *Smith*, 2 Ld. Raym. 836; 44 E. 3. 29 b; Co. Lit. 134). Hence, it is a general rule, that wherever the defendant can plead to the jurisdiction of the Court, there the lord of the franchise may claim conusance, but not vice versâ. (See Gilb. C. P. 193). This privilege of claiming conusance is confined to courts of record. (2 Inst. 140). The Chancellor of the University may claim conusance in a superior court. (*Magdalen College's case*, 1 Mod. 104). And it was allowed in K. B., on a claim made by the Vice-Chancellor of the University of Oxford, during the vacancy of the office of Chancellor by death, on behalf of the University. (*Williams* v. *Brukendon*, 11 East, 543).

‡ Conusance may be claimed where defendant is in actual custody of the marshal. (*Duncombe* v. *Church*, M. T. 1695, K. B., 1 Salk. 2). But it shall not be allowed where the defendant is a stranger, not having any property within the franchise; (see 22 Ass. c. 3); nor where the action is in K. B. against an heir on the bond of his ancestor, and he has no assets within the jurisdiction of the inferior court; (see Cro. Jac. 502; 2 Roll. Rep. 48); nor shall it be allowed where the plaintiff is an attorney or an officer of this Court, and consequently privileged to sue here; (see Lit. Rep. 40; 3 Leon, 149); and in the Exchequer of Pleas, a member of either University cannot set his privilege against that of an officer or accountant, or against any person suing as a debtor, this Court not being mentioned in their charter of exemption. (See Hardr. 188). So, a claim of conusance was refused to the University of Oxford, the party, though a member, not being a resident at Oxford. (*Hayes* v. *Long*, T. T. 1766, C. P., 2 Wils. 310).

IV. TIME AND MANNER OF CLAIMING CONUSANCE*.

V. PLEA OF CONUSANCE†.

Conversion. See tit. *Trover.*

Conveyance. See tits. *Bankrupt—Bond—Contract—Composition with Creditors—Copyhold—Lease—Vendor and Purchaser—Will.*

Conveyancer‡.

Convict. See tits. *Colony—Habeas Corpus.*

Conviction§.

I. RELATIVE TO THE FORM OF THE CONVICTION.

(*a*) In general, p. 91.

* The claim of conusance must be made after appearance, (*Wild* v. *Villers*, H. T. 1693, K. B., Comb. 319), and before plea. (*Wills* v. *Trehern*, M. T. 1727, C. P., Barnes, 346; S. C. Prac. Reg. 96; S. P. *Kendrick* v. *Kynaston*, H. T. 1764, K. B., 1 Blac. 454). The claim of conusance must be made in person or by attorney; (*Parker* v. *Edwards*, H. T. 1692, K. B., 1 Show. 352; S.C. Holt, 181); and when claimed ought to be entered on the roll. The claim is exhibited in Court, and a motion is made that it be allowed; then, on the claim and other documents above-mentioned being read, the Court grant a rule upon the plaintiff to shew cause why the conusance should not be allowed, and upon cause shewn, or default made, the Court make the rule absolute, or discharge it, as in ordinary cases. (*Brown* v. *Renouard*, 12 East, 10). If conusance be allowed, a transcript of the record is sent to the inferior Court, but the record itself remains here; and if the plaintiff afterwards cannot have justice done him in the Court below, he may have a re-summons upon the record remaining in this Court. (See 1 Sellon, 257; Tidd, 570). If the claim be allowed, a day is given on the roll for the lord of the franchise to hold his court, and the justices are commanded to be there on that day. (See Rast. Ent. 129; 2 Wils. 411; 2 Ld. Raym. 836; 12 Mod. 644; 3 Salk. 79). And if a re-summons issue on failure of right in a franchise, the lord of the franchise shall afterwards have conusance of that plea. (See Jenk. 34; 5 Vin. Abr. 576).

† A plea of conusance being a demand of something quod sibi debetur, it must state every thing that is to take away the general jurisdiction of the superior Court; and the whole ought to be set forth with all the proceedings in the cause in the superior Court till the instant of making the claim; and if the plea be insufficient in form or substance, it may be demurred to, or the facts therein alleged may be traversed by the plaintiff. (See 2 Wils. 410; Comb. 319; Rast. Ent. 129).

‡ A conveyancer may maintain an action for his fees. (*Poucher* v. *Norman*, 3 B. & C. 744; S. C. 5 D. & R. 648; abr. ante, vol. 2, p. 201; S. P. *Davies* v. *Sibley*, 6 D. & R. 4). But in *Jenkins* v. *Slade*, E. T. 1824, N. P., 1 C. & P. 270, it was decided by *Best*, C. J., that a certificated conveyancer could not support such an action.

§ A conviction is a record of the summary proceedings upon any penal statute,

(*b*) In particular. See tits.

Beer,
Carrier,
Deer,
Excise and Customs,
Fishery,
Game,
Highway,
Justices of the Peace,
Mandamus,
Master and Servant,
Outlawry,
Overseers,
Plate,
Smuggling,
Stage Coach,
Thames,
Vagrant Act.

II. RELATIVE TO DRAWING UP THE CONVICTION, p. 95.

III. RELATIVE TO DEFENDANT'S RIGHT TO A COPY OF THE CONVICTION, p. 96.

before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced. The examination and punishment of offenders in a summary manner by justices of the peace out of their sessions, and without the intervention of a jury or an open trial, are founded entirely upon a special authority, conferred and regulated by statute. No new offence is cognizable in that manner, unless expressly made so by act of Parliament; and all the proceedings under an authority so created must be strictly conformable to the regulations prescribed by the special law in each instance, from which all their force is derived. Their proceedings are matters of record. (See 1 Salk. 200; 2 Bl. Rep. 1146; 5 D. & R. 558; 3 B. & C. 649). It becomes, therefore, a part of the magistrate's duty to record the proceedings in a formal shape. (See 2 T. R. 285; 1 Str. 147; Paley on Convictions). The object in this note will, therefore, be to advert to the particular steps which must be taken previously to the conviction; the peculiar mode in which the instrument itself must be drawn up, and the steps that must be taken to give effect to it where valid, or avert the consequences of it when an informality in law or fact renders such a course available, being the particular subject of inquiry in the act. First, then, it is requisite in all summary proceedings of a penal nature, that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which it seems that the justice is not authorized in intermeddling, (Lofft, 240), except when he is empowered by statute to convict on view. If the information appears to justify the interference of the magistrate, the next step is to give the party accused notice of the accusation, and an opportunity to answer it, by issuing a summons containing the substance of the charge. (1 Salk. 181; 6 Mod. 41; 8 Id. 154, n. *a*). For offences merely arising by penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognisance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but can only summon him to attend, and in default of his appearance proceed ex parte. (4 D. & R. 734; 5 Id. 588; S. C. 4 B. & C. 649). The power of enforcing appearance by compulsory means is, however, sometimes supplied by statute, directing the magistrate first to summon the party, and upon default or non-appearance to issue a warrant for his apprehension. (See 5 Geo. 2, c. 20, s. 7; 6 Geo. 2, c. 29, s. 22; 15 Geo. 2, c. 33, s. 6; 20 Geo. 2, c. 39; 26 Geo. 2, c. 30, s. 17; 31 Geo. 2, c. 29, s. 34; 1 Geo. 4, c. 56, s. 3; 5 Geo. 4, c. 83; 2 D. & R. 600; 2 Bing. 67). If the defendant appear, any irregularity in the summons, or even the want of a summons altogether, becomes immaterial, (1 Str. 261; 2 Mod. 1785; 1 Salk. 383; 2 Id. 428; 1 East, 649), except it be in a case where a special form of summons is required by the act, which may not have been complied with. (Cowp. 30). Upon the defendant's appearance, he either prays time, or confesses the charge, or denies it and makes defence immediately. In the first case, if he pleads not guilty, and requires time for his defence, and to produce his evidence, it is reasonable, and the law seems to require that the party should be allowed a proper interval for that purpose. (3 Burr. 1786; 1 East, 469). The hearing may either, upon the application of the defendant, or for any other cause, be adjourned to a subsequent day, taking care not to exceed the time, if any be limited by the act, for making the conviction. (3 East, 467). If the

IV. RELATIVE TO THE FILING OF THE CONVICTION AT THE SESSIONS, p. 96.

V. RELATIVE TO THE CONSTRUCTION OF THE CONVICTION, p. 96.

VI. RELATIVE TO THE CONSEQUENCES OF A CONVICTION, p. 96.

VII. RELATIVE TO APPEALS ON CONVICTIONS, p. 97.

VIII. RELATIVE TO THE REMOVAL OF CONVICTIONS BY CERTIORARI, p. 98.

IX. RELATIVE TO THE POWERS AND DUTY OF THE COURT CONVICTING, p. 98.

I. RELATIVE TO THE FORM OF THE CONVICTION.

(*a*) In general*.

ALDRIDGE, *Ex parte*, H. T. 1824. K. B. 2 *B. & C.* 600; S. C. 4 *D. & R.* 83.

THE Court quashed a conviction on the acts against smuggling, because it did not set forth in express terms that it was proved on oath before the justice that the person "was carrying and conveying" the brandy liable to forfeiture.

The conviction must state that the offence was proved *upon oath*;

REX *v.* TAYLOR, M. T. 1826. K. B. 7 *D. & R.* 622.

A CONVICTION against an apprentice for misbehaviour did not shew that he was an apprentice within 4 Geo. 4, c. 29, s. 2, *i. e.*

and must shew that the justices

charge be confessed, nothing more remains for the magistrate but to pass judgment, and impose the penalty. If the defendant appears and denies the charge, or neglects to appear after being duly summoned, the next step is to substantiate the information by testimony. For that purpose, the prosecutor or informer must produce his witnesses to prove the facts alleged. When the case and evidence have been heard on both sides, it remains for the magistrate to convict the party, or to dismiss the complaint, according to his judgment, upon the circumstances. So far it has been deemed advisable to notice those steps which are preliminary to judgment and conviction. A more minute investigation will be postponed until a subsequent part of the work, under the following tits.:—*Informations—Justices of the Peace*, &c. (And see Paley on Convictions, by Dowling, p. 17, &c.).

* Some of the difficulties in drawing up a conviction in due form have in a great measure been removed by the statute 3 Geo. 4, c. 23, intituled "An Act to facilitate summary proceedings before justices of the peace and others." This statute points out a general form appropriated to most cases coming under the cognisance of justices upon penal statutes not otherwise generally provided for; and much of the law contained in the previous decisions of the courts may now be considered as superseded by the operation of that statute, though the general form given by the act does not apply to those cases which fall under many statutes where a particular form of conviction is prescribed.

had jurisdiction;

upon whose binding out no larger sum than 25*l.* had been paid:—Held insufficient, the justices not appearing to have had jurisdiction to convict.

SMITH, *Ex parte*, M. T. 1823. K. B. 3 *D. & R.* 461.

and state the facts constituting the offence, in order that the Court may see that the law is duly administered;

A CONVICTION set forth, that a person was found carrying and conveying seven gallons of foreign brandy in two casks, called half ankers, subject and liable to forfeiture under and by virtue of an act of Parliament relating to the revenue of customs and excise in the United Kingdom; for that the said foreign brandy being goods liable to the payment of customs and other duties, had been then and there unshipped with intention to be laid on land, (customs and other duties not being first paid and secured), contrary to the form of the statute.

The Court held, that the facts which made the brandy liable to forfeiture should have been stated, for there might be brandy not liable to pay custom or excise duties; and quashed the conviction. (See 45 Geo. 3, c. 121, s. 7).

REX *v.* WILSON, T. T. 1834. K. B. 3 *N. & M.* 753; S. C. 1 *A. & E.* 627.

unless the justices convict on their view, then the facts presented to them need not be stated.

ON a conviction for forcible entry and detainer under 8 Hen. 6, c. 9, a rule had been obtained calling on certain justices of Leicester to shew cause why a mandamus should not issue, calling on them to amend their return to a certiorari from this court by returning the information on which the conviction in this case was founded, and also to set forth on the face of the conviction the evidence which was given touching the entry into the premises in the conviction mentioned. This application was made on the stat. 3 Geo. 4, c. 23, by the first section of which a form of conviction is given in all cases where a particular form has not been directed requiring the evidence to be stated.

Per Cur.—As far as the mere information goes, we can see no objection to their returning that, but, as far as the evidence of the entry goes, that is not necessary. The justices are authorized by the statute of Richard II., (15 R. 2, c. 2), to go to the place where such force is made, and upon view convict. They are, therefore, not bound to set out upon the face of the conviction any evidence.

PAIN, *Ex parte*, H. T. 1826. K. B.—S. P. 5 *B. & C.* 251. REX *v.* NORTH, M. T. 1825. K. B. 6 *D. & R.* 143.

The conviction must not be in the alternative;

UNDER 6 Geo, 4, c. 108, s. 3, a conviction stated, that A. B. was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the British channel, having in a certain manner attached thereto divers, to wit, twenty casks (of the dimensions mentioned in sect. 3), and of the sort or description used, *or* intended to be used for the smuggling of spirits, the said casks not being really necessary for the use of the vessel and included in the regular official documents of the vessel."

The Court held, that the allegation that the casks were "of the sort or description used, *or* intended to be used, for the smuggling of spirits," being in the alternative, was bad.

REX *v.* PAYNE, H. T. 1824. K. B. 4 *D. & R.* 72.

THE warrant of commitment reciting a conviction under 50 Geo. 3, c. 48, of carrying more than the limited number of outside passengers, was for three months, "unless before that time he pays the sum of 6*l.* with the expenses of the warrant, viz. a sum of £——," without specifying the sum.

The Court held, that the charges not being ascertained, the conviction and commitment were bad, and therefore ordered to be quashed and defendant discharged.

nor contain a blank, as a sum of £—, leaving the blank.

REX *v.* HALL, H. T. 1826. K. B. 6 *D. & R.* 84.

IN this case the Court decided, that where the conviction is by default, it must be clearly shewn on the record that the party has been personally served with the summonses, and had an opportunity of being heard.

See 1 *Salk.* 181; 2 *East, Rep.* 196.

And if a party does not appear, it must be shewn that he was summoned personally.

HAWKINS, *Ex parte*, T. T. 1823. K. B. 2 *B. & C.* 31.

A CONVICTION, on the 24 Geo. 2, c. 47, s. 1, stated that C. H. was convicted of having been found on board a vessel subject to forfeiture, for hovering &c. within the limits of a port of this kingdom. Two objections were taken; 1st, that the vessel was not liable to forfeiture; and, 2nd, because it was not alleged that C. H. was a British subject.

Per Cur.—The offence is not sufficiently described in the conviction. All that appears is, that the vessel was hovering within certain limits; but it is much too narrow a construction of the statute to say, that the mere act of hovering is sufficient to sustain the conviction. The hovering contemplated by the legislature is, hovering with power to proceed, and without any sufficient cause for not doing so. The second ground relied on is also of itself sufficient to invalidate the conviction; for, if the party be not a British subject, he is not guilty of any offence, in consequence of this vessel being found in the situation described. Though the form be given by a statute, the offence must be legally stated. (See 1 B. & C. 101).

Though a statute gives a form of conviction, the offence must be correctly stated*;

PAIN, *Ex parte*, H. T. 1826. K. B. 5 *B. & C.* 251.

CONVICTION, under 6 Geo. 4, c. 101, s. 3, (smuggling), of being on board a vessel liable to forfeiture, as found within the British Channel, having in a certain manner attached to them divers, to wit, twenty casks of the sort or description "used or intended to be used," for the smuggling of spirits:—

Held bad, as not alleging the casks to answer either of the three descriptions in the act; but that they answered one or other of those descriptions, and that such allegation not shewing the offence to be contemplated by the act, was bad.

and shew it was one contemplated by the act;

* In an action against a justice of the peace for false imprisonment, who justified under a conviction under the Vagrant Act, (5 Geo. 4, c. 83):—Held, that the conviction was not vitiated by the omission of the word "part" before "of Great Britain," in the recital of the title of the statute, as directed in the form given by the act. (*Nixon* v. *Nanney*, 1 Gale & D. 370).

REX, *In re*, M. T. 1824. K. B. 4 *D. & R.* 352.

and must state the evidence on both sides, if so required by the statute;

IN a conviction, under the 3 Geo. 4, c. 23, the Court held, that the direction of the statute clearly requires the justice to set out the evidence on both sides, according to their discretion, where it is relevant to the matter in issue.

HIGGINBOTHAM, *Ex parte*, M. T. 1840. Q. B. 9 *D. P. C.* 200.

but a conviction for an offence under an expired statute, if within a subsequent statute, is good.

THE conviction professed to be founded on the 39 Geo. 3, c. 79, s. 15. That section declared certain places disorderly, within the meaning of 36 Geo. 3, c. 8; if money was paid for admission thereto, and if any person received money for admission, he was rendered liable, in case of conviction, to a penalty of 20*l.* That statute, however, was only in force for three years, and having expired, no such offence, as that which was here made the subject of conviction, could be considered as in existence. That this was so, appeared from the 2 & 3 Vict. c. 12, s. 4, which provided, "that it shall not be lawful for any person or persons whatsoever, to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information, in any of her Majesty's courts, or before any justice or justices of the peace, against any person or persons, for the recovery of any fine, penalty, or forfeiture, made or incurred, or which may hereafter be incurred under the provisions of this act, unless the same be commenced, prosecuted, entered, or filed in the name of her Majesty's Attorney-General or Solicitor-General, in that part of Great Britain called England."

Per Patteson, J.—By the 39 Geo. 3, c. 79, certain places are declared to be disorderly, within the meaning of the 36 Geo. 3, c. 8, and a penalty is attached to certain offences committed in those places. Those offences are still punishable under the former act, although the latter was only passed for a limited period.

GRIFFITHS *v.* HARRIES, E. T. 1837. Ex. 2 *M. & W.* 325.

An error in the adjudication of the fact which creates the offence, or the judgment thereon, vitiates the conviction;

A CONVICTION was founded on 1 Will. 4, c. 32, (game), which directs the penalty to be paid to the parish officer, and by him to be paid over for the use of the county rate, (but which, by 5 & 6 Will. 4, c. 20, s. 2, was directed as to one moiety to be paid to the informer, and the other as before), and adjudicated the whole penalty to be paid to the overseer, to be applied according to the direction of the statute in such case &c.

The Court held, that such conviction was bad, and that an imprisonment, until so paid, was illegal, and that the justices were liable in trespass. If either the adjudication of the fact, which constitutes the crime, or the judgment thereon, is imperfect, the conviction is bad.

NEWMAN *v.* BENDYSHE, E. T. 1839. Q. B. 10 *A. & E.* 11; S. C. 2 *P. & D.* 340.

so, a conviction, charging three distinct offences is bad, as not furnishing

A CONVICTION, under the Beer Acts, (1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85), stated, that the party charged had kept his house open for the sale of beer, and had sold beer, and suffered and permitted beer to be consumed upon his premises, after the hour fixed

by justices for closing beer-shops. The party was convicted in a single penalty of 40*s.* "for the offence aforesaid."

any protection against another information*;

The Court held, that this conviction was bad, for that it alleged three distinct acts, each of which might be an offence against the statute, and would, therefore, afford no protection to him, if a fresh information were laid against him, in respect of either one of those facts.

NUNN, *In re,* M. T. 1828. K. B. 8 *B. & C.* 644; S. C. 3 *M. & R.* 75.

but a conviction, under the 6 Geo. 4, for being found "on the high seas," in a ship liable to forfeiture, by a justice, at the first place on land, is good.

UNDER the 6 Geo. 4, c. 108, s. 74, it is enacted, "That in case any offence shall be committed upon the high seas against this or any other act relating to the revenue of customs, or any penalty or forfeiture shall be incurred upon the high seas for the breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place on land in the United Kingdom into which the person committing such offence, or incurring such penalties or forfeiture, shall be taken, brought, or carried; and in case such place on land is situated within any borough, liberty, franchise, or town corporate, as well any justice of the peace for such borough, &c., as any justice of peace of the county within which such borough is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas; any charter or act of parliament to the contrary notwithstanding: Provided always, that all offences against this or any other act, relating to the revenue of customs, committed in any city, shall be deemed and taken to have been committed in the county within which such city, &c., is situated, and as well any justices of the said city, &c. as any justice of any county in which such city, &c. is situated, shall have jurisdiction to hear and determine the same." A vessel liable to forfeiture under this act was seized in a part of the river Orwell, where the justices of Ipswich had jurisdiction, and a person found on board the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas, on board a vessel liable to forfeiture.

The Court held, that the justices of Harwich, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence.

II. RELATIVE TO DRAWING UP THE CONVICTION†.

* And a conviction against the owner of a boat for plying for hire by his servants, without being qualified, must state he received some of the hire. (*Rex* v. *Taylor,* 2 Chit. Rep. 578).

† If a valid subsisting conviction be proved at the trial, which appears by the date to warrant the act done under it, the Court will not inquire into the time when it was actually drawn up. (*Massey* v. *Johnson,* 12 East, 82; S. P. *Gray* v. *Cookson,* 16 East, 20; S. P. 10 Mod. 382). And, indeed, even after the magistrate has delivered to the defendant a copy of a conviction, as that upon which the subsequent proceedings have been founded, he is not thereby precluded from drawing up and returning a conviction in a more formal shape, which is to be taken as the only authentic record of the proceedings. (*Rex* v. *Barker,* H. T. 1800, K. B., 1 East, 187; S. P. *Massey* v. *Johnson,* H. T. 1810, K. B., 12 East, 67; *Rex* v. *Allen,* E. T. 1812, K. B., 15 East, 333).

III. RELATIVE TO THE DEFENDANT'S RIGHT TO A COPY OF THE CONVICTION*.

IV. RELATIVE TO THE FILING OF THE CONVICTION AT THE SESSIONS†.

V. RELATIVE TO THE CONSTRUCTION OF THE CONVICTION‡.

VI. RELATIVE TO THE CONSEQUENCES OF A CONVICTION.

MORGAN *v.* BROWN, H.T. 1836. K. B. 6 *N. & M.* 57.

Two parties, jointly convicted of an assault, cannot be fined jointly§.

IN answer to an action of trespass, the defendants relied upon a conviction under 9 Geo. 4, c. 31, which convicted the plaintiff and another party of an assault, and ordered the two to forfeit and pay the sum of 4*s*.

Per Cur.—The defendants in this case justify imprisoning the plaintiff upon a conviction under 9 Geo. 4, c. 31; and unless that conviction be bad, there is no doubt that the defendants were justified; but we must own that we think that it is bad. It may be an award that each shall pay the whole sum of four shillings, or that they shall both pay that sum jointly; but a party who is convicted and fined has a right to know clearly and distinctly what sum he has to pay, in order to relieve himself from imprisonment. Each of the parties was guilty in law of a separate offence, and the intention may have been that each should pay half of the fine imposed; and yet either of the parties, who might be ready to pay his portion of the fine, and have paid it, might be still kept in prison till the other had paid his portion; and that inconvenience cannot be

* The defendant is entitled to have a copy of the conviction, if it be necessary to his defence, against an action for the same offence. (*Rex* v. *Midlam*, T. T. 1765, K. B., 3 Burr. 1720).

† A magistrate should, in all cases, return a conviction to the sessions. (*Rex* v. *Eaton*, H. T. 1787, K. B., 2 T. R. 285).

In an action against a magistrate for false imprisonment:—Held, that a conviction, filed at the quarter sessions, was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commitment. (*Rogers* v. *Jones*, 1824, N. P., 1 R. & M. 129).

‡ The old rule, that the Court will be astute in discovering defects in convictions, is now exploded. (*Rex* v. *Thompson*, T. T. 1787, 2 T. R. 18). There are not, however, wanting numerous authorities establishing the reverse position. (*Rex* v. *Little*, 1758, K. B., 1 Burr. 613; S. P. *Rex* v. *Green*, Cald. 391; S. P. *Rex* v. *Chandler*, 2 Salk. 378; S. P. *Rex* v. *Parker*, Comb. 439; S. P. *Rex* v. *Corden*, 4 Burr. 2281).

§ The mode of enforcing the payment of pecuniary fines is usually by distress or imprisonment. The power of proceeding compulsorily is, however, entirely derived from statute. (See Paley on Convictions, by Dowling, p. 236, and 236, n.). And even this power may be suspended by appeal. (*Wootton* v. *Harvey*, H. T. 1805, K. B., 6 East, 75). But, if such appeal does not take place, the justice usually forthwith issues his warrant. (*Rex* v. *Wyatt*, T. T. 1705, K. B., 3 Ld. Raym. 1189; S. C. 1 Salk. 380; S. C. Fortesc. 127; S. C. 11 Mod. 54). In default of distress, the offender may be committed. (*Hill* v. *Bateman*, T. T. 1739, K. B., 1 Stra. 710).

avoided, unless each has a distinct notice of the sum to be paid by him. Hawkins lays down that a joint fine is erroneous, and refers to a case in 11 Coke's Rep.

VII. RELATIVE TO APPEALS ON CONVICTIONS*.

Rex *v.* Justices of Warwickshire, H. T. 1835. K. B. 4 *N. & M.* 370.

On an appeal against a conviction, the sessions may affirm the conviction, subject to a case, and afterwards award punishment.

By the 14th section of 5 Geo. 4, c. 83, any person aggrieved by any act of justices, &c., may appeal to the next general or quarter sessions, &c.; and the court, at such general or quarter sessions, shall hear and determine the matter of such appeal, &c.; and, in case of affirmance of conviction, shall issue the necessary process for the apprehension and punishment of the offender according to the conviction.

The Court held, that the court at such general quarter sessions had reference to the description of the court, and not to the component parts thereof; and that, when the quarter sessions upon appeal had confirmed the conviction, subject to a case, and the conviction had been sent down to a subsequent sessions with a procedendo, the court at such subsequent sessions had jurisdiction to award process of commitment.

Rex *v.* Justices of Newcastle upon Tyne, T. T. 1831. K. B. 1 *B. & Ad.* 933.

A party was convicted under the 5 Geo. 4, c. 83, as a rogue and vagabond, for indecently exposing his person. A notice of appeal, that he was not guilty of the offence, is insufficient.

Rule nisi for a mandamus to the defendants to enter an appeal, with a continuance thereon, and in the mean time to discharge the appellant out of custody. He had been charged before a magistrate of Newcastle with having obscenely exposed his person, with intent to insult a female, and had in consequence been convicted under the stat. 5 Geo. 4, c. 83, (ss. 4, 17), as a rogue and vagabond. Against this conviction he had given the magistrate notice of appeal (s. 14); wherein, as the ground thereof, he stated that he was "not guilty of the offence." The defendants at the sessions refused to entertain the appeal, alleging that the notice was insufficient, inasmuch as it did not sufficiently notify the ground of such appeal. They therefore affirmed the conviction, and committed the appellant to the house of correction.

Per Cur.—It is not sufficient for a person convicted under the Vagrant Act, (5 Geo. 4, c. 83, s. 4), of the offence of obscenely exposing his person, to state in his notice of appeal that he is not guilty of the offence; such a statement is too general and indefinite a ground of appeal to satisfy the act.

* An appeal against a conviction is by no means a matter of common right; it will not lie, unless given by the express words of some statute. (*Rex* v. *Hanson*, 4 B. & Ald. 519). There is no general statute upon the subject. The appeal, when given, is to the sessions of the county or borough stated in the margin of the conviction; except that, in the case of conviction by the magistrates of a borough to which the Crown has not granted a separate quarter sessions, the appeal must be to the quarter sessions of the county in which such borough is situate. (See 5 & 6 Will. 4, c. 76, s. 111). Whether it is to be to the next sessions after the conviction, or within a certain time after the conviction, or within what other time it must be lodged, must depend entirely upon the wording of the act of Parliament by which the appeal is given.

REGINA *v.* JUSTICES OF CHESHIRE, H. T. 1840. Q. B. 3 *P. & D.* 21.

Under a conviction by two justices, under 6 Geo. 4, (alehouses), notice of appeal must be given to both the justices.

A RULE had been obtained calling on the justices for the county of Chester to shew cause why a writ of mandamus should not issue, commanding them to enter continuances, and hear the appeal of Francis Rigby against a conviction made by Shalcross Jackson, Esq., and Sir Richard Brooke, Bart., justices, or by one of them, bearing date on or about the 27th of November last; and whereby the said Francis Rigby was convicted of certain trespasses and contempts against the form of the statute made and passed in the ninth year of the reign of his late Majesty King George the Fourth, for regulating the granting of licenses to keepers of inns, alehouses, and victualling-houses. (9 Geo. 4, c. 61, s. 27). On the 1st of December the appellant served Sir Richard Brooke with a notice of appeal, addressed to him as "chairman of a meeting of magistrates held at Dewsbury, in the county of Chester, on Tuesday, the 27th day of November last." No notice was served on Mr. Jackson. At the ensuing quarter sessions the appellant obtained a copy of the conviction, signed by R. Brooke only.

Per Cur.—Mr. Jackson was at liberty to sign the copy of the conviction at any time; and he was as much a party to it as the other magistrates. He should have been served with notice.

VIII. RELATIVE TO THE REMOVAL OF, BY CERTIORARI *. See also ante, tit. *Certiorari.*

IX. RELATIVE TO THE POWERS† AND DUTY OF THE COURT CONVICTING.

REX *v.* RICHARDSON, M. T. 1826. K. B. 6 *D. & R.* 141.

The Court cannot compel a defendant to go before the Master, instead of passing judgment.

IN this case the Court decided, that although where prosecutors do not desire to press for judgment, and the interests of the public are not compromised, the Court may suggest to the parties to go before the Master; yet it cannot compel a defendant to do so, nor can it give costs to prosecutors by indictment.

* In all cases where the certiorari is not taken away by statute, a summary conviction by a magistrate may be removed by it into the Court of Queen's Bench, for the purpose of having it quashed for any errors appearing upon the face of it; but where it appears by the conviction that the defendant appeared before the magistrate and pleaded, and the merits have been tried, and that the defendant has not appealed against the conviction, (where the appeal is allowed), or, if appealed against, such conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. (3 Geo. 4, c. 23, s. 3). This statute, however, does not cure the omission of a circumstance necessary to constitute the offence. (*Rex v. Walsh*, 3 Nev. & M. 632).

† It may be necessary to mention that the room or place in which the magistrate sits to hear and determine a matter of complaint in this summary way, is in law a public and open court, to which the public generally may have access; and the party accused shall be admitted to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

SELWOOD *v.* MOUNT, 1839. N. P. 9 *C. & P.* 75.

IN trespass, to try the validity of a conviction—

Alderson, B., said, Magistrates ought not, I think, to take an indemnity. It is a bad practice; as it has the effect of enabling them more safely to decide in favour of a party who is able to give an indemnity than of one who cannot do so.

An indemnity to justices for convicting is illegal.

Convoy. See tits. *Insurance—Ship and Shipping.*

Co-Parcener. See tits. *Parceners—Ejectment.*

Copy of Written Instruments.

I. RELATIVE TO COPIES IN GENERAL.

(*a*) AS TO SWORN OR EXAMINED COPIES, p. 99.
(*b*) AS TO OFFICE COPIES, p. 99.

II. RELATIVE TO COPIES IN PARTICULAR CASES.

See tits.

Bills and Notes,
Constable,
Contract,
Conviction,
Corporation,
Courts,
Declaration,
Deed,
East India Company,
Evidence,
Fines and Recoveries,
Indictment,
Judgment,
Manor,
Notice,
Parish,
Parliament,
Particulars of Demand,
Perjury,
Process,
Record,
Statutes,
Tithes,
University,
Warrants,
Writs.

I. RELATIVE TO COPIES IN GENERAL.

(*a*) AS TO SWORN OR EXAMINED COPIES*.—See also tit. *Evidence.*

(*b*) AS TO OFFICE COPIES†.—See also tit. *Evidence.*

* A copy is never admissible, where the original is produced; (see 10 St. Tr. App. 137); and wherever the law entrusts a particular officer with the making of copies, it also gives credit to them in evidence, without further proof; (see Bac. Abr. *Evidence*, F.; Bul. N. P. 229); therefore, the chirograph of a fine is evidence of the fine itself, because the chirographer is an officer appointed by law to make out such copies. (See Bul. N. P. 229; Com. Dig. *Evidence*, A. 2.). So, it is a general rule, that whenever the original is of a public nature, a sworn copy is admissible in evidence; (see Ld. Raym. 154; 1 Stra. 126; 3 Salk. 153); therefore, all judicial proceedings, whether British, or in foreign courts, may be proved by means of a sworn copy. (See Burr. 1177; Hard. 119).

† Office copies of judicial proceedings, that is, copies given by a person who is not entrusted for that purpose, are not admissible, without proof that they have been actually examined. (See Bull. N. P. 229).

Copyhold, Estate of*.

See tits. *Bail—Bankrupt—Land Tax—Mortgage—Remainder—Reversion—Settlement—Will.*

I. OF THE CIRCUMSTANCES NECESSARY TO A COPYHOLD ESTATE, p. 112.

II. RELATIVE TO THE NATURE OF COPYHOLD ESTATES, p. 113.

III. WHEN COPYHOLD ESTATES DO OR DO NOT BECOME FREEHOLD, p. 114.

IV. RELATIVE TO THE CREATION AND GRANT OF COPYHOLDS, p. 115.

V. RELATIVE TO THE TRANSMISSION OF COPYHOLD ESTATES.

(*a*) As to the surrender.

1. *As to its necessity,* p. 116.
2. *What shall amount to a Surrender,* p. 117.
3. *What may be surrendered,* p. 117.
4. *As to who may surrender,* p. 117.
5. *As to the Parties to whom a Surrender may be made,* p. 117.
6. *As to the Place and Mode of making a Surrender,* p. 118.
7. *As to the Operation and Effect of a Surrender,* p. 120.
8. *As to the Construction of a Surrender,* p. 121.
9. *The Revocation of a Surrender,* p. 122.
10. *An erroneous Surrender,* p. 122.
11. *Mode of enforcing a Surrender,* p. 122.

(*b*) As to the admission.

1. *As to its Nature, and when an Admission is necessary,* p. 122.
2. *As to the Proclamations previous to Admission,* p. 123.
3. *As to the Parties who may admit,* p. 124.
4. *As to the Parties who are entitled to be admitted,* p. 124.

* The formation of a copyhold estate is a manor, in substance, as ancient as the Saxon constitution; though, perhaps, differing from those that exist at this day. A manor, manerium à manendo, because the usual residence of the owner seems to have been a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called terræ dominicales, or demesne lands, being occupied

V. RELATIVE TO THE TRANSMISSION OF COPYHOLD ESTATES—(*continued*).

5. *As to the Place where it is to be made*, p. 126.
6. *As to the Mode in which it is to be made*, p. 126.
7. *As to the Effect of the Admission*, p. 126.
8. *As to an erroneous Admission*, p. 127.

VI. RELATIVE TO THE DESTRUCTION OF COPYHOLD INTERESTS.

(*a*) By forfeiture, p. 127.
(*b*) By extinguishment, p. 130.
(*c*) Enfranchisement, p. 130.

VII. AS TO THE RELATIVE SITUATIONS OF LORD AND TENANT.

(*a*) As to the lord.

1. *Connected with his right of Property*, p. 130.
2. *To appoint a Steward*, p. 131.
3. *Of the Manor Courts and Courts Baron*, p. 131.

(*b*) As to the tenant.

1. *As to his Duties.*

1.—*Connected with the Payment of Fines*, p. 132.

2.—*Connected with Heriots*, p. 134.

2. *As to his Privileges and Disabilities*, p. 135.

VIII. RELATIVE TO THE REMEDIES THE LORD AND TENANT HAVE TO PROTECT THEIR RESPECTIVE RIGHTS.

(*a*) By action.

1. *By whom maintainable*, p. 137.
2. *As to the Court where they are to sue*, p. 138.
3. *As to the Form of Action*, p. 138.
4. *As to the Pleadings*, p. 138.
5. *As to the Evidence*, p. 138.
6. *As to the Witnesses*, p. 140.

(*b*) By distress, p. 140.
(*c*) By customary plaints, p. 140.
(*d*) By writ of mandamus, p. 140.

by the lord, or dominus manerii, and his servants. The other, or tenemental lands, they distributed among their tenants, which, from the different modes of tenure, were distinguished by two different names: first, book land, or charter land, which was held by deed, under certain rents and free services, and in effect differed nothing from the free socage lands; and from hence have arisen most of the freehold tenants, who hold of particular manors, and owe suit and service to the same;

the other species was called folk land, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion, being, indeed, land held in villenage. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. (See Cov. Cop. s. 31). A manor cannot now be created, not even by the King himself; length of time being the very essence of a manor. And as Sir Edward Coke expresses it, such things as receive their perfection by the continuance of time come not within the compass of a king's prerogative; therefore the King cannot grant freeholds to hold by copy, nor create a custom.

All manors existing at this day must have existed as early as King Edward the First; for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of the stats. 17 Edw. 2, c. 6, and 34 Edw. 3, c. 15, no tenant in capite, since the accession of that prince, and no tenant of a common lord, since the statute of quia emptores, (18 Edw. 1, c. 1), could create any tenants to hold of himself.

By 4 & 5 Vict. c. 35, a variety of alterations have been introduced with respect to copyhold estates: it has, however, been deemed advisable to insert the cases on the subject, as a guidance under the statute, as well as with reference to litigation which may arise connected with copyholds previous to the passing of the act, especially as the 4 & 5 Vict. is not compulsory; it being entirely voluntary whether the copyholder will avail himself of the statute or not. The statute is intituled, "An act for the commutation of certain manorial rights, in respect of lands of copyhold and customary tenure, and in respect of other lands subject to such rights; and for facilitating the enfranchisement of such lands, and for the improvement of such tenure;" and came into operation on the 21st June, 1841, with the exception of ss. 86, 87, 88, 89, and 90, which were not to be in force until the 31st December, 1841.

The preamble, after reciting, "That it is expedient to provide the means for an adequate compensation for the rents, fines, and heriots payable to the lords of manors, in respect of lands of copyhold and customary tenure, and in respect of other lands subject to such payments, or any of them, and for facilitating the voluntary enfranchisements of such lands, and for improving such tenure," enacts, that "'The tithe commissioners for England and Wales,' for the time being, shall be the commissioners for carrying this act into execution; and that, should the same not be fully carried into effect before the duties of the said tithe commissioners shall cease, it shall be lawful in such case for one of her Majesty's principal secretaries of state to appoint any number of fit persons to be commissioners to carry this act into execution, in the place of such commissioners so ceasing to act, and at pleasure to remove any one or more of the commissioners so appointed, so that the number of commissioners shall never exceed three; and upon every vacancy in the office of commissioner, some other fit person shall be appointed to the said office in like manner; and until such appointment it shall be lawful for the remaining commissioners or commissioner to act as if no such vacancy had occurred."

Commissioners].—By s. 2, the commissioners are to be styled "the copyhold commissioners," who are to cause a seal to be made, and all documents to which the seal is attached are to be received in evidence. By s. 3, the commissioners are to report to the secretary of state, and an annual report is to be laid before Parliament. By s. 4, the commissioners may appoint and remove assistant commissioners. By s. 5, no commissioner eligible to sit in the House of Commons. By s. 6, the operation of the act as to appointments is limited to five years. By ss. 7, 8, and 9, the salaries, fund out of which payable, and the declarations of the commissioners, &c., are regulated. And by ss. 10, 11, and 12, commissioners may delegate their power, provide for disabilities of lords or tenants, and authorize agents being appointed by power of attorney.

Commutation, Notice of.]—By s. 13, it is enacted, "That any lord or lords of any manor, whose interest shall not be less than one-fourth of the whole annual value of such manor, or any tenant or tenants of any manor to the number of ten, or where there shall not be so many tenants as ten, then one-half of the tenants of such manor, may call a meeting of the lords and tenants of such manor, by a notice thereof in writing, under his or their hands, to be affixed at least twenty-one days before such meeting on the principal outer door of the church of the parish within the limits of which the said manor, or the greater part thereof in value, extends, or on the door, or on some conspicuous part of some house or building, wherein the courts for the said manor are usually held, and to be twice at least within such twenty-one days inserted in some newspaper, (or

once in each of two newspapers, published in successive days), generally circulated in the county within which the said manor, or the greater part thereof in value extends, for the purpose of making an agreement for the general commutation of the rents, fines, and heriots thereafter to become due in respect of lands holden of such manor, and of the lords' rights in timber; and every lord and tenant attending such meeting shall bear his own expenses of attendance; and the lord and tenants who shall be present at any such meeting called as aforesaid, such tenants not being less in number than three-fourths of the tenants of such manor, and the interest of the lord, and the interest of the tenants in the manor and lands respectively, not being less than three-fourths of the interest in the value thereof respectively, computing the interest of tenants as hereinafter is provided, may proceed to make and execute such an agreement as is hereinafter mentioned for the commutation of the rents, fines, and heriots thereafter to become due in respect of the lands holden of the said manor, and of the lords' rights in timber; and if expressly between such lords and tenants, the commutation may be made to extend to rights in mines and minerals, but otherwise shall not extend to or affect such rights; and thereupon such agreement shall be reduced into writing, and a memorandum or minute thereof shall be signed by the persons so agreeing to such commutation, or by their respective agents."

Agreement for.]—By s. 14, it is enacted, "That such agreement for a commutation of the rights of the lord may be for the payment of an annual sum by way of rent-charge, and of a small fixed fine upon death or alienation, which shall in no case exceed the sum of five shillings, such rent-charge to commence, either in whole or in part, according as the said commissioners shall direct, from the date hereinafter mentioned, (except where otherwise directed by the said commissioners), and to be valued and variable, (when such rent-charge shall exceed twenty shillings), according to the price of corn, in like manner as is mentioned and provided with regard to the tithe commutation rent-charge, in and by the said act for the commutation of tithes in England and Wales; and the amount of every such rent-charge may be specifically stated in such agreement, or separate rent-charges may be therein agreed upon between the lord and any one or more tenants, parties to the agreement; or the agreement may provide that the entire rent-charge, though stated therein, shall be subject to increase or diminution by the valuers, to be appointed as hereinafter mentioned, to such an amount per centum as shall be therein expressed, or that such separate rent-charges as aforesaid shall be subject to increase or diminution to a given amount per centum, in certain events to be specified in the agreement; and the agreement may also determine the apportionment for each tenant, or it may provide that the entire rent-charge, or the apportionment thereof, shall be fixed by such valuers, subject to the approbation of the said commissioners; and it may be agreed, that so much of the rent-charge, to be apportioned as aforesaid, in respect of the lands of any tenant, as shall be in lieu of fines, or other manorial rights, to which such tenant would not be liable thereafter during his tenancy, shall not commence until the period of the next act or event on which a fine, or such other manorial right, would have become payable or due, and that the amount of such rent-charge shall be then increased accordingly; but such agreement shall not fix the time for the commencement of the rent-charge to be apportioned in respect of the lands of any tenant who shall not be party to such agreement; and all other provisions may be made for carrying into execution the intention of the parties and of this act, so that nothing in such agreement contained, (unless every tenant included therein shall be a party thereto), shall exclude or prevent the exercise of the powers hereinafter contained for apportioning the rent-charge according to the particular circumstances of each tenant, and for the relief of tenants for life, and other persons in the cases hereinafter provided for; and such agreement may fix a scale of fees to be payable to the steward, from and after the confirmation of the apportionment; but so, nevertheless, as not to affect the interests of any steward in office at the time of the passing of this act, who shall hold his office for life, or during good behaviour, or of any steward of a manor, so in office as aforesaid, where the usage shall have been such as, in the opinion of the said commissioners, to lead to a just expectation that the said steward will hold his office during his life or good behaviour; and such agreement may provide for the costs of the proceedings under this act, subject to the approbation of the said commissioners; provided always, that in case of doubt or difference as to the sufficiency of interest of the parties to any such agreement, the decision of the said commissioners thereon shall be conclusive; and every agreement so made and executed, and confirmed in manner hereinafter mentioned, shall be binding on all persons interested in such manor or lands."

Consideration for.]—By s. 15, it is enacted, "That such agreement for a commutation of the rights of the lord as aforesaid may also be for the payment of a fine on death or alienation, or at any fixed period or periods, to be agreed upon by the parties, every such fine to be fixed by the agreement, or to be subject to increase or diminution by the valuers to be appointed as hereinafter mentioned, to such amount per centum as shall be expressed in such agreement; but, in either case, to be valued in bushels of wheat, barley, and oats, in the same manner as the tithe commutation rent-charge, and to be subject, in like manner as such rent-charge, to variation according to the prices ascertained by the advertisement, provided for by the said act for the commutation of tithes in England and Wales, to be published next before the time of the happening of the act or event on which the fine shall become payable."

Provisional Agreements.]—By s. 16, such agreements are to be binding, if executed by the necessary parties within six months.

Voting.]—By s. 17, proportional interest how to be computed for the purpose of voting.

Meetings.]—By s. 18, meetings may be adjourned after notice.

Form of Agreements and References to Arbitrator.]—By ss. 19, 20, and 21, the commissioners are to form agreements and circulate them; and, if disputes arise as to boundaries or commutation, to refer to arbitration.

Parties' Consent to the Agreement.]—By s. 22, it is enacted, "That, in every case in which any manor or lands shall be held under any archbishop, bishop, dean, dean and chapter, archdeacon, or any ecclesiastical or other corporation, or any body politic, and in every case in which any such person, ecclesiastical or other corporation, or body politic, or patron of any living, shall be interested in any manor or lands to the extent of one-third of the value thereof, computed as to such lands as aforesaid, or if it shall appear to the said commissioners that the interests of such person, ecclesiastical or other corporation, or body politic, would be affected by the commutation or enfranchisement under this act, no agreement to be made and executed under this act shall be deemed to be executed by the said lords and tenants, unless the consent of such person, ecclesiastical or other corporation, or body politic, shall be given under the hand or seal of the person, ecclesiastical or other corporation, or body politic, or patron of such living giving the same; and such consent shall be annexed to the agreement for commutation or enfranchisement, and taken as part thereof."

Agreement must be confirmed by the Commissioners.]—By s. 23, it is enacted, "That every such agreement, as soon as may be after it shall have been executed by the lord and tenants to the number and value as aforesaid, shall be sent by the chairman of the meeting, or by the person in whose custody it shall then be, to the office of the said commissioners; and the said commissioners, by themselves, or by some assistant commissioner, shall cause inquiry to be made, and shall require such proof as will be satisfactory to them, whether or not it ought to be confirmed; and if they shall be satisfied it ought to be confirmed, the said commissioners shall confirm the agreement under their hands and seals, and shall add to such agreement the date of the confirmation, and shall publish the fact of such confirmation, and the date thereof, within the manor, in such way as they shall deem fit; and every such confirmed agreement shall be binding on all persons interested in the said manor, and on all persons interested in the said lands, and shall not be liable to be invalidated by reason of any doubt or question as to the sufficiency in the number and interest of the parties entering into such agreements: provided always, that it shall be lawful for the said commissioners, by themselves, or by some assistant commissioner, at their discretion, if the circumstances of the case shall in their opinion require it, to direct that the rent-charge to be paid by any particular tenant or tenants shall not commence until the period of the next act or event on which the fine or other manorial right for which such rent-charge shall be commuted would have become due and payable; and that the amount of such rent-charge shall be then increased in such proportions as the said commissioners or assistant commissioners shall think proper."

Valuers, Appointment of.]—By s. 24, valuers are to be appointed at a commutation meeting.

Valuation.]—By s. 25, it is enacted, "That as soon as may be after the choosing such valuers, and after the confirmation of the said agreement, the said valuers shall apply to the said commissioners for instructions as to the duties to be performed by them pursuant to such agreement; and having received such instructions, shall proceed to make and send in to the said commissioners such valuations, apportionments, and schedules as they shall require; and whenever an even number of valuers shall be chosen, it shall be lawful for the said com-

missioners, by any writing under their hands and seals, (to be communicated either together with or soon as conveniently may be after the said instructions), to appoint a fit and proper person to be an umpire between such valuers; and the decision of the umpire on the questions in difference between the valuers shall be binding on them respectively, and shall be adopted by them respectively in their valuation."

Valuers, Duty of.]—By s. 26, valuers may enter the lands, &c., for the purpose of valuation, having previously made a solemn declaration.

Steward, Duty of.]—By s. 27, steward to furnish information for the purpose of enabling valuers to make valuation, and otherwise to facilitate commutations under the act. The steward shall, in such manner as commissioners shall direct, on request by valuers or chairman of meeting, make a correct statement in writing of—

The tenants of the manor:

Description of their lands:

The amount of assessment to poor-rate:

Amount received for heriots in respect of each tenant for three times previous:

And any other information which the commissioners shall direct:

Shall produce same for inspection at the meetings, and allow extracts to be taken; and, upon request by valuers, deliver to them a copy of such schedule, or the parts which they may require for such statements and extracts; the steward to receive such sum as shall be agreed on, and fourpence for seventy-two words, for copies or extracts.

The steward shall also, within three calendar months after the signature of the agreement, or such time as the commissioners shall fix, make out and send to them such information as they may direct.

Power to make inquiries personally, or by letter sent by post, as to ages of tenants; and enactment that tenant refusing to give information shall not afterwards be allowed to object to age stated, unless the commissioners shall see cause to direct otherwise; and penalty on giving untrue statement.

Steward to give from time to time such other information to commissioners as they may require, with penalty on default.

By s. 28, the valuers are to take the particular circumstances of each case into consideration.

Valuation, Schedule of.—By s. 29, copies of schedules by valuers to be lodged with steward for inspection by all interested parties, without charge; and notice to be given as commissioners may direct, with penalty on refusal to allow inspection.

Notice to fix time for hearing objections; and at such meetings objections to be heard and determined by assistant commissioner, with power to adjourn when requisite, and direct any further valuation, &c., to be made.

No lord of a manor or other person to be allowed to object without giving two days' previous notice of intention to object, unless upon cause shewn to the satisfaction of the commissioners; such notice from a tenant to be left with the steward, and inspected by other parties with schedules. Forms of notices to be supplied to steward, and by him delivered to party applying.

After hearing and determining objections, assistant commissioner to amend schedules; and power to him or commissioners to amend such valuations or schedules as to alterations by deaths, change in ages, &c., on satisfactory proof, by affidavit or otherwise, that such alterations are requisite.

Expenses of Commutation.]—By s. 30, it is enacted, "That the expenses of the proceedings, &c., affecting any commutation under this act, shall (except in cases where, from special causes, the said commissioners shall direct otherwise, and then as they shall direct, and except in cases where the parties to the said agreement shall therein otherwise provide, and then as they shall have provided,) be payable in manner following: (that is to say), where the valuers shall be appointed by the tenants, the costs of the valuations, apportionments, and schedules shall be paid by the tenants included in the commutation in ratable proportion to the sum charged on their land respectively, under and by virtue of this act; but where the valuers shall be appointed by the lord and tenants as aforesaid, then, if not more than two shall be appointed, the lord shall pay half the costs, and the tenants as aforesaid shall pay half; and where more than two valuers shall be appointed, the lord shall pay one-third, and the tenants as aforesaid shall pay two-thirds; and in all cases of dispute or difference as to the amount of the costs, or the persons on whom any costs should fall, the commissioners have power to decide the same."

Schedule, by whom made.]—By s. 31, after valuation the commissioners are to make a schedule. By s. 32, they are to inspect and point out errors therein; and by s. 33, are to deposit copies with the steward of the manor and clerk of the peace.

Notice of Agreement.]—By s. 34, it is enacted, "That the said commissioners, if they shall see fit, before confirming any agreement, valuation, assessment, schedule, or apportionment, may require notice thereof to be given in such manner as they shall direct to the person next in remainder, reversion, or expectancy of an estate of inheritance in any manor or lands, or any other person to whom they may think notice ought to be given; and may by themselves, or by some assistant commissioner, hear and determine any objection made to such confirmation by any person so interested therein."

Errors in Agreement.]—By s. 35, it is enacted, "That it shall be lawful for the said commissioners to correct or supply any manifest error or omission in any agreement, valuation, assessment, schedule, or apportionment, at any time after the same shall respectively have been made or confirmed, with the consent in writing of all the parties affected by such error or omission, but not otherwise."

Of Fines and Heriots.]—By s. 36, lands to be discharged from the payment of all the lord's rents, fines, and heriots, and rights in timber, and a rent-charge and fixed fine to be paid in lieu thereof.

This discharge is to take place from the 1st of January next following the confirmation of the apportionment; and from that day, or from such time as shall be fixed by the commissioners, a rent-charge is to be payable; and a fixed fine, not exceeding five shillings, upon death or alienation, to be stated in the apportionment. The rent-charge (when it shall exceed twenty shillings) to be valued in bushels of wheat, barley, and oats, and variable according to the prices of such grain, in the same manner as the tithe commutation rent-charge, and to be payable half-yearly; or the commutation consideration may be only a fine payable on death or alienation, but to be valued in bushels of wheat, barley, and oats, and variable according to the prices for the time being of such grain.

The Rent.]—By s. 37, it is enacted, "That in every case in which, by the agreement entered into as aforesaid, any rent-charge or rent-charges shall have been left subject, in certain events, to increase or diminution, the schedule of apportionment shall set forth the events on the happening of which such increase or diminution is to take place, and the amount or rate of increase or diminution respectively."

Valuers' Default in appointing.]—By s. 38, it is enacted, "That if, upon the expiration of six calendar months after the confirmation of any agreement to be made as hereinbefore mentioned, no valuers shall have been appointed, or their valuation, apportionments, or schedules (as the case may be) respectively, shall not have been made, and sent to the office of the said commissioners, or if any valuer appointed under or by virtue of this act shall die or become incapable of acting, it shall be lawful for the said commissioners from time to time to appoint such competent person or persons as they shall deem fit as valuer or valuers, with the like powers and duties, and whose costs and expenses shall be payable in like manner as is hereinbefore provided with respect to valuers to be appointed and acting under any such agreement for commutation as aforesaid."

Disputes, Commissioners' Power in.]—By s. 39, the commissioners are to hear and determine disputes touching any fines or other manorial payments or incidents, except mines, &c.

Appeal.]—By s. 40, "Persons dissatisfied with the decision may appeal by issue at law or on a case stated: provided always, that, after such verdict given and not set aside by the Court, or after such decision of the Court, the said commissioners or assistant commissioners shall be bound by such verdict or decision; and the costs of every action, or of stating such case, and obtaining a decision thereon, shall be in the discretion of the Court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the Court; and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said Court."

Proceedings not to abate.]—By s. 41, it is enacted, "That no proceedings of or before the said commissioners or assistant commissioner, or in any action, or in any case stated, or reference, in pursuance of this act, shall abate or cease by reason of the death of any person interested therein. And by s. 42, in case of death of parties before actions brought, &c., the same to be brought and carried on in their names.

Witnesses.]—By s. 43, witnesses may be subpœnaed and examined; and papers, &c., are to be produced; and s. 44 regulates the expenses of witnesses.

Of the Rent-charge].—By s. 45, it is enacted, "That every tenant or occupier who shall pay any such rent-charge as aforesaid, or any expenses legally chargeable under this act upon the land of which he shall be such tenant or occupier, shall be entitled to deduct the amount from the rent payable by him to his landlord, and shall be allowed the same in account with his landlord."

Exemption.]—By s. 46, it is enacted, "That in every case in which any tenant or occupier shall show to the commissioners that he holds copyhold lands for a term of years of a tenant of any manor at a lower rent than the sum about to be imposed on the same for commutation or enfranchisement, or for the expenses incurred under the provisions of this act, it shall be lawful for the said commissioners to declare all agreements entered into under the authority of this act null and void so far as regards such lands, and such lands shall be exempted from the provisions of this act, unless the tenant on the court roll shall give such security for the payment of all sums to be charged on such lands as shall be satisfactory to the said tenant or occupier and to the commissioners."

Remedy for Rent-charge.]—By s. 47, it is enacted, "That in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years, provided that not more than two years' arrears shall at any time be recoverable by distress."

And by s. 48, when rent-charge is in arrear for forty days after half-yearly days of payment, and no sufficient distress on the premises, writ to be issued directing sheriff to summon jury to assess arrears.

And by s. 49, the Court out of which the writ shall have issued, or any judge at chambers, may order the owner of the rent-charge to account for the rents and produce of the lands, and to pay over the surplus, (if any), to the person entitled, and thereupon a writ of supersedeas is to issue; Court or Judge, by rule or order, may give summary relief.

By s. 50, the powers of 4 & 5 Will. 4, are to extend to rent-charges under this act, (the 4 & 5 Vict.).

Commutation of Fines, &c.]—By s. 51, it is enacted, "That nothing in this act contained shall affect any right to any rents, fines, or heriots, or any other manorial right proposed as the subject of commutation, which shall have become due or shall have accrued on or before the first day of January next following the confirmation of the apportionment."

Voluntary Commutation.]—By s. 52, the lord and any one or more tenant or tenants of any manor, (whatever may be their respective interests), may enter into an agreement with the consent of the commissioners for the commutation of the lord's rights to rents, fines, and heriots, and any other of the lord's rights, in consideration of a rent-charge variable as before mentioned, (where it shall exceed 20*s.*), and of a small fine certain (not exceeding 5*s.*), on death or alienation; and such agreement may include an apportionment of the rent-charge or other consideration for commutation, and of the expenses &c. If twelve or more tenants agree a schedule may be made by steward. Notice to be given to remainder-man. Commutation may be made by an absolute conveyance, or by an agreement to be enrolled on the court rolls of the manor.

By s. 53, powers of lords of manors to recover commutation fines.

By s. 54, power to effect supplemental or substituted commutation.

Apportionment of Rents and Fines.]—By s. 55, any apportionment of commutation of rents or fines to be effected by an entry of apportionment on the court-rolls, as now done in case of apportionment of quit-rent.

Enfranchisement.]—By s. 56, for the purpose of affording to the lords and tenants respectively the opportunity of effecting enfranchisements, it shall be lawful for the lord and tenants of any manor, (whatsoever may be their estate or interest therein), with the consent of the commissioners under this act, to enfranchise any of the lands holden of the said manor in consideration of a sum of money to be agreed between them and the tenant affected, and certain facilities are given to such enfranchisements and cases of disabilities provided for.

How effected.]—By s. 57, it is enacted, "That if such agreement for enfranchisement shall not be entered into by all the tenants of the manor, or their number shall be less than twelve, or whatever may be their number, if the parties shall think fit, an enfranchisement may be effected with the consent of the said commissioners by such conveyance, deed, or assurance, as would or might

be adopted for effecting such enfranchisement if the lord were seised of the manor for an absolute estate of inheritance in fee-simple in possession."

And by s. 58, commissioners, before giving their consent to the agreement, shall, upon the written request of any three or more tenants, parties thereto, satisfy themselves of the title to the manor; and the expenses of that investigation, as well as the general expenses, shall be borne by the parties, as may be agreed upon; and in default as the commissioners shall direct. In case the lord shall refuse to afford the required information, the agreement to be null and void.

Payment of Enfranchisement Money.]—By s. 59, it is enacted, "That in all cases in which the lord for the time being shall be only entitled to the manor for a limited estate or interest therein, or shall be under any legal disability, the sum or sums of money to be paid for enfranchisement shall be paid and applied in manner hereinafter provided for."

By s. 60, power to tenants to defer in certain cases payment of a portion of the consideration for enfranchisement until the next event at which a fine would be payable.

By s. 61, when the sum becomes due the lord shall be entitled to the rents and profits of the land, and may proceed to obtain possession as in like cases of default.

Power to Tenant to defer Payment of Consideration for Enfranchisement.]—By s. 62, it is enacted, "That it shall be lawful for any tenant at any reasonable time after the execution of the agreement for enfranchisement, (to be fixed by the commissioners, or, in default of their fixing any other limit, at any other time, or until within ten days next previous to the delivery by the steward to the commissioners of the schedule of apportionment), to declare, by notice under his hand, to be delivered to the lord or steward as in cases of other notices, his desire that such compensation shall remain a charge on the lands affected thereby for any number of years, not exceeding fourteen, or, as to tenants for life, for the whole period of his life, and one year longer, and which notices the said steward shall forthwith, or with the schedule of apportionment, send to the commissioners; and thereupon the said commissioners, with the consent of the lord, but not otherwise, shall insert in a column of the apportionment to be appropriated to that purpose the number of years or period for which such charge is to be continued, and thereupon (subject as after mentioned) no proceedings shall be instituted during such term or period to enforce payment of the principal money so apportioned; provided that lawful interest shall be paid half-yearly on the days to be mentioned in such apportionment, or if not mentioned therein at the expiration of each half-year, computed from the date thereof, and that such proceedings may be instituted; and nothing in the act contained shall extend to protect any tenant or other person from such proceedings in case one and a half-year's interest shall remain due on the said principal sum apportioned, or on any part thereof, to the extent of one-half; provided also, that during the term so fixed the lord shall not be compellable to receive payment of the principal money without receiving twelve calendar months' notice of intention to pay off the same, and that in case the interest on such principal sum shall be in arrear thirty days, it shall be lawful for the party entitled to receive such interest-money to levy the same by distress and sale of the goods on the lands and tenements enfranchised and affected by such enfranchisement money."

By s. 63, where payments are deferred by tenants, provision made as to lords being tenants for life.

Substituted Titles].—By s. 64, it is enacted, "That all lands which shall be enfranchised under this act shall be deemed to be held under the same title as that under which the same were held at the time of such enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims, or demands affecting the manor of which the same were holden.

Expenses and Recovery.]—By s. 65, expenses of valuations and of making copies of apportionments and schedules, &c., required under the provisions of this act, and all expenses attending commutations or enfranchisements, (except otherwise provided for), shall be paid as commissioners may in apportionment or otherwise under their hands and seals direct; and if any difference shall arise as to amount to be paid by or to any person, the commissioners or assistant commissioner may under their or his hand certify amount; and in default of payment, the same may on production of certificate, or of a deposited copy of apportionment, be recovered before two justices of peace, by distress and sale, with costs of application and proceedings.

Action for Expenses.]—By s. 66, if expenses not levied within two calendar months after warrant of distress granted, the person entitled (if the same, including costs of distress, shall amount to forty shillings), his executors, &c., may recover

same with costs of suit, in any court of law at Westminster, against party named in certificate of apportionment, his executors, &c., in which action such certificate or copy of apportionment shall be satisfactory evidence of the amount of such expenses and of the same being due from and to the parties therein named; and the certificate of such justices under their hands shall be evidence of the costs of such application, and the warrant which they are required to give in such cases shall be satisfactory evidence of non-recovery of such expenses and costs under the distress.

Expenses of Trustees.]—By s. 67, "Every tenant of the manor being a trustee, (save as against an unadmitted mortgagee), shall be entitled to recover in like manner by distress or action respectively all expenses, costs, and charges, which he may have to pay under any such certificate, apportionment, distress, or action, from the person beneficially interested at the date of such apportionment in the land, his executors, &c., or by like distress on the land, and the occupiers thereof shall be entitled to deduct any such payments from any rent then or subsequently due; and should any dispute arise as to any trusteeship or right to recover, the same shall be determined by the commissioners or assistant commissioners, as in the case of causes of difference before mentioned; the like evidence of certificate &c., to be admitted in any such proceedings or action."

Costs.]—By s. 68, it is enacted, "That any tenant having a limited interest, and who shall pay any such expenses or costs, may, with the consent of the said commissioners under their hands, and by a simple entry on the court rolls of the manor court (and for which entry the steward shall only charge thirteen shillings and four pence, and which shall not be subject to any stamp duty,) charge such expenses and costs, with interests thereon, at the rate of four pounds per centum per annum, on the copyhold lands to which the same shall relate, but so nevertheless that the principal charge on such lands shall be lessened in every year following such charge by one-twentieth part at least of such original charge thereon, and shall be subject to previous mortgages."

The Lord's Right to Expenses.]—By s. 69, it is enacted, "That any lord of a manor having a particular interest, or being a trustee, and who shall (in the case of a commutation) pay any such expenses or costs, may, with the like consent of the said commissioners, charge such expenses and costs, together with the expenses he may reasonably incur in employing agents to protect his interests, or otherwise, with interest thereon at the rate of four pounds per centum per annum on the manor to which the same may relate, but so nevertheless that the principal charge on such manor shall be lessened in every year following such charge by one-twentieth part at least of such original charge thereon, and shall be subject to previous mortgages: provided always, that the amount of such last-mentioned expenses shall have been previously submitted to, and shall have received the approval of the said commissioners, or of an assistant commissioner."

Enfranchisement where a Mortgage.]—By s. 70, "From and immediately after date of final confirmation and apportionment, the several and respective lands holden of the manor shall stand chargeable with the respective sums mentioned in the apportionment as payable to the lord and steward respectively, with the lawful interest from that day until payment; and the person or persons for the time being seised of the manor shall be deemed to be seised of the said lands as mortgagee in fee thereof for the benefit of the lord as to the sums payable to him, and of the steward as to the sums payable to him; and that (subject to the power of continuing the charge as hereinbefore provided) it shall be lawful for the person so seised, or the lord or steward respectively in his name, from time to time, to adopt such means and proceedings as a mortgagee in fee of freehold lands is entitled to for the enforcing payment of such principal sums and interest, and with the like right to obtain payment of all attendant and incident costs."

To be first Charges.]—By s. 71, such sums shall be first charges, and have priority over all mortgages, charges, and incumbrances, &c. (tithe rent-charge alone excepted).

Power to mortgage.]—By s. 72, "Any tenant whose lands shall be enfranchised may charge the same (or any of them, if he holds all under same and for same estate) with payment of such sums and costs of such charge, and lawful interest, to any person advancing same, and his executors, administrators, and assigns; and for securing payment thereof to demise lands by way of mortgage, for any term of years, to such person, his executors, &c., or to such other person as he shall appoint; such demise to be made with a proviso or condition, declaring the term to be void on payment to the amount thereby secured, with interest at a time to be therein appointed, and such charge shall have the like priority, &c., with powers and rights of first mortgagee."

To whom Monies for Enfranchisement from Lord's Rights to be paid.]—By s. 73, monies to be received for enfranchisement from lord's rights to be paid to lord, his heirs or assigns, when absolutely entitled as tenant in fee; but when he shall be only entitled for limited estate or interest, or shall be under legal disability, such money to be paid as follows:—If it amounts to two hundred pounds to be paid into the Bank of England under the 1 Geo. 4, c. 35.

When less than Two hundred Pounds and more than Twenty Pounds.]—By s. 74, to be paid into the Bank of England, or to trustees, at the option of the parties entitled for the time being to the said manor.

Not exceeding Twenty Pounds.]—By s. 75, it is enacted, "That when any money so to be paid as last hereinbefore mentioned shall not exceed the sum of twenty pounds for all the enfranchisements in such manor, the same shall be paid, if the said commissioners shall so direct, to the respective parties for the time being entitled to the said manor, for his own use and benefit, or, in case of coverture, infancy, idiotcy, lunacy, or other incapacity, then such money shall be paid for their use to their respective husbands, guardians, committees, or trustees; and in case any dispute shall arise as to the proper application, appropriation, or investment of any enfranchisement money according to the intentions of this act, it shall be lawful for the said commissioners to decide such question, and their decision shall be final and conclusive thereon."

Payment to Lord not entitled thereto.]—By s. 76, it is enacted, "That if any principal money shall be paid for enfranchisement to the lord of any manor not entitled by the provisions of this act to receive the same, the land in respect of which such principal money shall have been so paid shall continue charged with the payment thereof in favour of the person legally or equitably entitled to the same, but with such remedies against the person who shall have wrongfully received such money as purchasers are entitled to by the rules of law or equity."

Payment to Stewards.]—By s. 77, it is enacted, "That all sums payable under this act for compensation to the steward, shall be paid to him, his executors, or administrators."

Receipts.]—By s. 78, it is enacted, "That the receipts of the persons to whom any sums of money shall be paid pursuant to this act shall be sufficient discharges for the same, and the person making such payment shall not be liable to see to the application of any such sums, or be answerable for the misapplication or non-application thereof; and for the better evidencing such payment the steward for the said manor for the time being shall, as to steward's compensation, forthwith after payment thereof, and as to the payments for enfranchisements from the lord's rights forthwith after production of receipts for the same, signed by the party entitled to sign the same, enter on the copy apportionment, to be deposited with him as aforesaid, a memorandum of such payment, and which memorandum shall in like manner as such receipt be deemed sufficient evidence of such payment, and discharge the lands and the person paying the same from the sums mentioned to be paid."

Confirmation of Apportionment.]—By s. 79, in cases of commutation, the customary modes of descent to cease, and the lands to descend and to be subject to dower and curtesy in like manner as freehold lands. But land still to be held by copy of court roll, and be conveyed by surrender and admittance. As to dower and curtesy, act not to apply to certain cases.

Gavelkind Lands exempt.]—By s. 80, it is enacted, "That nothing in this act contained shall extend, or be held, deemed, or construed to extend in any respect to affect, alter, or vary the custom of gavelkind as the same now exists and prevails in the county of Kent; but the same custom shall in every respect prevail and continue to prevail and be exercised in the said county in the same manner and to the same extent in all respects and particulars, after this act shall have passed, as it has prevailed and existed heretofore, any thing herein contained notwithstanding."

Lands to become freehold.]—By s. 81, it is enacted, "That, in the case of any enfranchisement under this act, from and after the final confirmation of the apportionment, or the execution of the conveyance, (as the case may be), the several lands therein respectively comprised and enfranchised, shall become and be in all respects of freehold tenure, but subject to the payment of the enfranchisement consideration in favour of the lords and stewards or other officer as aforesaid; and all mortgages affecting the same shall be deemed and become mortgages of the freehold of the same lands for a corresponding estate, if such enfranchisement consideration shall be paid off, and, if not paid off, mortgages of the equity of redemption thereof, subject to such mortgage interest as aforesaid for securing such consideration: provided always, that nothing herein contained shall operate to

deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto notwithstanding the same shall have become freehold; provided also, that no such enfranchisement or conversion into freehold shall affect, except as aforesaid, any mortgage, or defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement or conversion."

The Lord's Rights.]—By s. 82, no commutation under the act to affect rights of lords of manors to escheats, fairs, markets, apportionments, franchise, royalties, rights of chase, and in game, fisheries, &c., or any rights in mines or minerals. Nothing contained in the act to operate to empower any lord of a manor to inclose any common or waste lands in any part thereof. By s. 83, this act not to prevent any commutation or enfranchisement that may be made independently of this act.

By s. 84, power to tenants to grant rights of entry and way, &c., to lords for mining purposes.

By s. 85, Courts of equity may decree a partition of lands of copyhold or customary tenure.

By s. 86, lords of manors, or their stewards, may, after 31st of December, 1841, hold customary courts, although no copyhold tenant be present.

By s. 87, lords, or their stewards, may, after 31st of December, 1841, make, out of the manors and out of court, grants of land to be held by copy of court roll.

By s. 88, lords, or their stewards, may, after 31st December, 1841, grant admissions out of the manors and out of court.

By s. 89, after 31st December, 1841, every surrender, &c., delivered to the lord or steward, and every fact proved to the lord or steward, at any court whereat a homage shall not be assembled, shall be forthwith entered on the court rolls.

By s. 90, after 31st December, 1841, presentment by the homage shall not be essential to the validity of an admission.

By s. 91, lords of manors in certain cases not to grant any common or waste lands without consent of the homage of the manor.

By s. 92, power to lords to grant licenses to tenants to alienate their ancient tenements in portions where they are now restrained by the custom from so doing.

By s. 93, agreements, &c., not to be liable to stamp duties. No agreement, award, schedule of apportionment, or power of attorney made, or confirmed, or used under this act, chargeable with any stamp duty.

By s. 94, false evidence to be deemed perjury; withholding evidence a misdemeanor.

By s. 95, limitation of actions against commissioners, assistant commissioners, justices of the peace, &c.

By s. 96, proceedings under this act not to be quashed for want of form, nor to be removed by certiorari.

By s. 97, certain provisions of this act to extend to Crown manors and lands.

By s. 98, act to apply to Crown lands only where expressly provided.

By s. 99, act not to extend to the Duchy of Cornwall.

By s. 100, act to extend to England, Wales, and Ireland.

By s. 101, act may be altered this session.

Interpretation Clause.]—By s. 102, it is enacted, "That, in the construction, and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word 'manor' shall extend to a manor or reputed manor, of whatever tenure the same may be, or to such portion or portions of a manor, as the said commissioners shall, by any order in writing under their hands and seals, with the consent of the lord of the manor, signified by writing under his hand and seal, direct to be considered as a manor for the purpose of affecting any commutation or enfranchisement under this act; the words 'lord' and 'steward' shall include the person or persons for the time being filling those respective characters, or acting in those respective capacities, whether those persons shall be rightfully or lawfully entitled to fill such characters, or act in such capacities or not, and the word 'steward' shall also include the clerk of any manor; the words 'tenant' or 'tenants' shall comprise all persons holding by copy of court roll, or as customary tenants, or holding lands subject to any manorial rights, and whether holden to them and their heirs, or

I. OF THE CIRCUMSTANCES NECESSARY TO A COPYHOLD ESTATE*.

whether granted to two or more to be granted in succession, or holden for life or lives or years; the words 'land' or 'lands' shall extend to and comprise lands holden by copy of court roll, or by custom of any manor, and lands holden of any lord of a manor in ancient demesne, and whether in fee or for life or lives, or for years, and shall also comprise all lands holden of a manor, subject to any manorial rights, and shall extend to messuages, tenements, and corporeal or incorporeal hereditaments, subject to manorial rights, or any undivided part or share therein; the word 'enfranchisement' shall extend to and include the discharge of freehold lands from heriots and other manorial rights; the word 'heriots' shall include payments in lieu thereof; the word 'rents' shall include 'reliefs' and 'services,' not being service at the lord's court; and the word 'person' shall mean and include any body politic, or corporate, or collegiate, as well as an individual; and every word importing the singular number only shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; and every word importing the masculine gender only shall mean and include a female as well as a male."

See also 1 Geo. 4, c. 35; 11 Geo. 4 & 1 Will. 4, c. 65; 2 & 3 Will. 4, c. 80; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; and 2 & 3 Vict. c. 62, s. 7, which enacts, "That in every case of merger of tithes, or rent-charge issuing out of land of copyhold tenure, and subject to arbitrary fine, it shall be lawful for the said commissioners, on the application of the owner of such land, to ascertain, by such ways and means as they shall think fit, the annual value of the tithes or rent-charge so merged or intended to be merged; and the said commissioners shall in such case cause to be indorsed on the deed, declaration, or other instrument affecting such merger, a certificate under their hands and seals, setting such annual value so ascertained; and in every case of future assessment of fine on the lands, which, before such merger, were subject to such tithes or rent-charge, the parties entitled to such fine shall assess the same as if such lands were subject to the tithes or rent-charge of which the annual value shall be so indorsed; and the production of such deed or instrument of merger, or of a duplicate thereof, with such certificate indorsed, or of an office copy of such deed, declaration, or instrument, and certificate indorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."

* There are four circumstances necessary to the existence of a copyhold;—in the first place there should be a manor. (*Bradshaw* v. *Lawson*, M. T. 1791, K. B., 4 T. R. 443). It is also necessary that there should be a court, (see 1 Inst. 58 a; 4 Rep. 26б; Gilb. Ten. 210; Cro. Eliz. 102, 252, 395, 442, 661; Co. Cop. s. 45; Co. Cop. Sup. s. 13), the copyholder having no other evidence of his title than the rolls of the court. (*Rex* v. *Lucas*, T. T. 1808, K. B., 10 East, 235; S. P. *Rex* v. *Shelley*, H. T. 1789, K. B., 3 T. R. 141). The third circumstance necessary to the existence of a copyhold is, that the thing granted be parcel of the manor. (*Winter* v. *Lovedurr*, M. T. 1697, K. B., 12 Mod. 147; S. C. 2 Salk. 537; S. C. Comb. 37; S. C. Carth. 427; S. C. 5 Mod. 244; S. P. *Brittel* v. *Bade*, E. T. 1695, C. P., 1 Ld. Raym. 43; S. C. 1 Salk. 185; S. P. *Crowther* v. *Oldfield*, H. T. 1705, Ld. Raym. 1225). The fourth circumstance necessary to the existence of a copyhold is, that the lands, &c., have been demised or demisable by copy from time immemorial; (*Roe* v. *Newman*, E. T. 1760, C. P., 2 Wils. 125; S. P. *Cowper's case*, H. T. 1763, K. B., 6 Mod. 90); for this tenure derives its whole force from custom, so that no new copyhold can be created at this day, as nothing can be now granted by copy of court roll which was not granted or grantable by that tenure before. (*Rex* v. *The Inhabitants of Hornchurch*, M. T., 1818, K. B., 2 B. & Ald. 189).

II. OF THE NATURE OF COPYHOLD ESTATES *.

DOE *d.* LEACH *v.* WHITAKER, H. T. 1834. K. B. 3 *N. & M.* 225; S. C. 5 *B. & Ad.* 409.

Copyhold rents may be reserved without distinguishing in respect of the particular premises for which each is payable.

IN 1812, at a court baron, two tenements, pending a previous lease, were granted to R. and F., and seisin given, habendum for their lives, and the life of the longest liver successively, at the will &c., according &c., at the yearly rents of 26*s.* 4*d.*, and 7*s.* all services, and a heriot when it should happen, &c. R. was admitted, but that of F. was respited until, &c. In 1825, F., who had survived R., surrendered to the lords, lessees of the manor, who, by their steward, granted the premises to L. and N. upon the same rents and services, "and a heriot for each of the said tenements," and they were admitted tenants. This surrender and admittance were taken out of the manor, but were entered on the rolls as if done at a valid court.

The Court held, that there was no objection that two rents were reserved, without distinguishing how much was payable for each; nor a heriot for each when it should happen &c., according &c.; the rents being reserved according to the former grant, and the heriot, if not demandable, could not be enforced.

DOE *d.* EDMUNDS *v.* LLEWELLIN, T. T. 1835. Ex. 2 *C., M. & R.* 503.

The 55 Geo. 3, c. 192, applies to lands held by copy of court roll, according to the custom of the manor, as copyhold.

A SPECIAL verdict found, that certain estates within a manor were held, and were demisable by copy of court roll, according to the custom of the manor, but not at the will of the lord, and passed by surrender and admittance; and certain other incidents of copyhold property were also found—

Per Cur.—The question was upon the statute of 55 Geo. 3, c. 192, whether or not, by virtue of that statute, the estate in question, which had been devised by the testator, passed as the copyhold estate, there being no surrender to the use of the testator's will. On the special verdict, a point was made: that this is not a copyhold estate at all, because it did not appear on the special verdict to be held at the will of the lord; and, consequently, could not be within the operation of the statute, which applies only to copyhold estate. Now, though it may be true that this copyhold estate held at the will of the lord may not, in strict legal language,

* A copyhold estate may be described to be a parcel of the demesnes of a manor held at the will of the lord, according to the custom of the manor, by a grant from the lord, and an admittance of the tenant entered on the rolls of the manor court. (Littleton, c. 73).

In Littleton, p. 73, there is also a species of copyhold which is held according to the custom of the manor, but not at the will of the lord, called a free copyhold or customary freehold. It was formerly held, that the freehold of these estates was in the tenant, from which they acquired the appellation of customary freeholds, but it is now fully settled that the freehold is in the lord, (*Stephenson* v. *Hill*, H. T. 1663, K. B., 3 Burr. 1273; S. P. *Smith* v. *Pope*, H. T. 1696, K. B., Comb. 387; S. P. *Gale* v. *Noble*, M. T. 1697, Carth. 432; S. P. *Rogers* v. *Bradley*, H. T. 1688, C. P., 2 Vent. 144), being in truth but a superior species of copyhold. (*Doe* d. *Reay* v. *Huntington*, H. T. 1803, K. B., 4 East, 270; *Brown* v. *Rawlins*, T. T. 1806, K. B., 7 East, 409; S. C. 3 Smith's Rep. 254).

be copyhold, yet all the text writers, and especially Sir William Blackstone and our Lord Coke, treat these estates as copyholds, though distinguished in some of their characters.

SHIRLEY, *Ex parte*, H. T. 1839. C. P. 7 *D. P. C.* 258.

And copyhold is within the meaning of the words "lands of any tenure," in the 3 & 4 Will. 4, c. 74, s. 77 *.

A DIFFICULTY arose upon the construction to be put upon the 3 & 4 Will. 4, c. 74. The 91st clause authorized the Court to make an order, such as was sought to be obtained, when the husband should be living apart from his wife, "either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever." The 77th sect. enabled a married woman to dispose "of lands of any tenure;" but it contained a proviso that the act should not extend to "lands held by copy of court roll, of or to which a married woman, or she and her husband in her right, might be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands might be parcel.

Per Cur.—The words "lands of any tenure" in the 77th clause would certainly extend to copyhold premises. The difficulty arises upon the proviso in that section, which declares that the act shall not extend to lands held by copy of court roll; but we must construe the 77th and 91st clauses together.

III. WHEN COPYHOLD ESTATES DO OR DO NOT BECOME FREEHOLDS.

DOE *d.* SWEETING *v.* HELLARD, T. T. 1829. K. B. 9 *B. & C.* 789.

An allotment of copyhold after continued possession be-

AN ancient tenement was granted to C., D., and E., for the lives of C., D., and E., the life of E. having been put in by A., who paid part of the fine; and during the life of C., upon an enclosure of certain lands upon which the copyholder of the manor had rights, a

* By which it is enacted, "That it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel."

claim was made by D. in respect of such ancient tenement, though not in possession, and an allotment was made to him and the lords, according to their respective rights and interest, for and in respect of such ancient tenement, and he continued in possession thereof from the period of the award until his death; and no claim was made before the commission by C., the tenant in possession, nor any demand or acknowledgment made of D. in respect of the allotments. comes freehold*.

The Court held, that such allotments were freehold and not copyhold estate; but that the nominee in the award did not take any estate in the land allotted, but that the effect of the award was to vest the legal estate in the persons severally entitled in succession to the copyhold estate.

IV. RELATIVE TO THE CREATION AND GRANT OF COPYHOLDS.

Doe *d.* Foster *v.* Scott, M. T. 1825. K. B. 4 *B. & C.* 706; S. C. 7 *D. & R.* 190.

A grant of copyhold lands was made to P. C. for her life and the life of T. E., and the life of the survivor. By another grant the re- Copyholds are created† by

* By 4 & 5 Vict., ante, p. 102, all copyholds may be made freehold by consent and on the terms stated in that statute.

† It is a general rule that copyholds cannot be created at the present day; (*Townley* v. *Gibson*, M. T. 1788; K. B., 2 T. R. 705); unless by the transcendent power of an act of Parliament. It has been therefore decided, that a copyhold cannot be created by operation of law, nor by act of the party. (*Revell* v. *Jodrell*, E. T. 1788; K. B., 2 T. R. 415).

The 15 Hen. 8, c. 13, which enacted, "That the king's manors of Granges, &c., in the county of Norfolk, formerly part of the possessions of the abbey or priory of Walsingham, should and might be granted by copy of court roll in fee-simple, or for term of life or lives by the stewards of the said manors, their under-stewards or deputies, for such rents, services, fines, heriots, and customs, as in the said copies should be specified; which copies should be good against the king, his heirs, successors, and assigns." See also 37 Hen. 8, c. 2, enacting, "That so much of Hounslow Heath as was the king's inheritance, and was meet for tillage, pasture, meadow, or other several ground, should be of the nature and condition of copyhold land; or the same might be letten by the steward of the manor at will, or for twenty-one years, which lessee should or might improve it." On this ground the copyhold must be granted on the usual services and returns. Sir *Edward Coke* lays it down in express terms, that the most trivial variation must not be made from the ancient services, else the heir may avoid the grant; nay, if the ancient rent, says he, were expressly reserved in gold, and on the new grant it be reserved in silver, it would be fatal; or if two copyholds escheat, the one usually demised at 20*s.* rent, and the other at 10*s.*, and the lord grant them both rendering 30*s.* it would not be good. (Co. Cop. s. 41; 2 Bl. Com. 370; ch. 22; Gilb. Ten. 148; 2 Roll. Rep. 236; Cro. Eliz. 699).

The creation of a tenure somewhat similar to copyholds appears to have been attempted by the Society of New Inn in granting out their chambers for lives. It is customary with that society, in such grants, to insert a clause that the tenant shall not sell or assign without the license of the society, and for the grantees when they wish to transfer their interest to surrender the chambers (upon a proper deed stamp) to the treasurer and ancients, to the intent that they shall grant the said chambers to the transferee, which subsequent grant is never in point of fact made, but simply an entry of admittance is inserted in the society's books. (*Doe* v. *Miller*, 1 T. R. 393). "It is therefore evident," says Mr. Adams in his treatise on Ejectment, p. 61, "that after the first surrender the legal estate always remains in the treasurer and ancients as trustees for the subsequent transferees respectively; and that the terms surrender and admittance bear not the slightest resemblance in their meaning to the surrender and admittance to copyhold premises."

grant, and therefore whether a general or special occupant must be decided by the grant.

version was given to M. C., B. C., &c. for their lives, and the life of the longest liver. P. C. died, having devised the lands to T. E., who entered and held them more than twenty years. M. C. and B. C. now brought an ejectment to gain the possession.

Per Cur.—We are of opinion that the defendant is entitled to our judgment. By the copy of court-roll of 1752 an estate was granted to P. C. for the lives of herself and T. E., and during the life of every and either of them the longest living, successively, according to the custom of the manor. That estate might, by custom, have enured to the person nominated as the second life, or to the heir or devisee of P. C., but no such custom is stated in this case. We must therefore have recourse to the general rules of law. Now, by the grant of 1770, an estate was given to B. C. in reversion, to take effect after the death, surrender, forfeiture, or other sooner determination of the estate of P. C. By the general rule of law there cannot be a general occupant of copyhold lands, nor any special occupant, unless expressly named in the grant.

HOLLOWAY *v.* BERKELEY, M. T. 1826. K. B. *6 B. & C.* 2.

The creation of a tenancy in common in copyhold does not destroy the entirety of the tenement.

Two persons took under a devise as tenants in common, and one surrendered his interest to the other, (there having been no severance). On the question whether at the death of the other who took the entire interest, the lord was entitled to a heriot originally demandable, or to two heriots—

Per Cur.—The question in this case in substance is, whether, upon a tenancy in common the share of each tenant constitutes a distinct tenement; or whether, notwithstanding the distinct estates of each tenant in common, the copyhold does not still remain an entire tenement. The custom (which is against common right and to be construed strictly) gives a heriot in respect of each tenement of which the copyholder dies seised. It is not in respect of each estate or copyhold tenement of which the tenant dies seised, but in respect of each tenement. In the case of heriot service or heriot custom the law multiplies the heriot in two cases; one, where the tenement is actually divided and converted into two or more separate tenements; the other where the tenement is left entire, but different persons have distinct undivided estates therein.

V. RELATIVE TO THE TRANSMISSION OF COPYHOLD ESTATES.

(*a*) AS TO THE SURRENDER.

1. *As to its Necessity* *.

* A copyhold estate cannot properly be transferred through any other medium than that of a surrender. Before the statute of quia emptores terrarum this was a usual mode of conveying freehold estates; (see Mad. Bar. Angl. C. 3, c. 4, p. 230 b.; Mad. Form. Angl. No. C.; Dalrymp. F. P. ch. 6, s. 1; Mag. Rot. 2; Jo. Rot. 7 a.; and copyholds being still considered in law as estates at will, they can only be thus transferred. A surrender may be defined the yielding up of an estate by the tenant to the lord, either as a relinquishment or resignation of such estate, or as the means of conveying it or transferring it to another.

2. *What shall amount to a Surrender*.*
3. *What may be surrendered†.*
4. *As to who may surrender.*

DOE *d.* SHELTON *v.* SHELTON. E. T. 1835. K. B. 4 *N. & M.* 857; S. C. 3 *A. & E.* 265.

Where a feme-covert can only surrender with the consent of the husband, his consent will not be presumed, it must be expressed in the surrender‡.

BY the custom of a manor, on the surrender of a wife, if the husband consents to the surrender, such consent shall be expressed in the surrender and admission; and without his consent the surrender is wholly inoperative; and, by the custom of the manor, the husband takes no interest after the wife's decease, as tenant by the curtesy.

Per Cur.—It seems to us that such a custom is good, and applies generally, whether the husband has an interest or not; and thus a surrender by the wife, in which it did not appear that it was with the husband's consent, would be void. At all events, supposing evidence of such consent could be supplied by parol testimony, yet, upon a case, which did not find that there was any consent, the Court would not take upon themselves to draw an inference of that fact, from circumstances stated, although by the case, they were at liberty to draw any inference which a jury might have drawn.

* The word "surrender," is said by Sir *Edward Coke* to be vocabulum artis, and to admit of no qualified term. (Co. Cop. s. 39, Tr. 86; and see 6 Vin. Abr. Cop.); yet he tells us in the same section that a surrender (when by a subsequent admission the grant is to receive its perfection and confirmation) is rather a manifesting of the grantor's intention than the passing away any interest in the possession. But although there is such unseeming obscurity and inconsistency in the books, the distinction drawn in the margin of the above case would appear to be the correct deduction. (See 2 Watkins, 76; 1 Lev. 137; 6 Vin. Abr. Cop.; Com. Dig. tit. Cop.; Bac. Abr. tit. *Copyhold*, and Fisher on Copyholds). It has been holden that if the copyholder use the words "bargain and sell," instead of "surrender," it will be sufficient to extinguish his copyhold for the benefit of the lord; (Hutton, 65; Sir W. Jones, 41); and a parol agreement has been adjudged a surrender; (2 Show. 131); but that such words would not operate as a surrender so as to benefit a stranger, for in that case the heir of the copyholder may avoid it. (Carth. 57).

† Nothing can properly be the subject of a surrender but a legal interest. When a person, therefore, is not in the seisin, he cannot properly surrender. If he has only an equity, or right, or authority, or, in short, any claim which lies not in tenure, he must pass it by another mode of conveyance. (See 3 T. R. 365; 6 Id. 63; 1 Anst. 11). An equitable interest in copyholds, therefore, may be assigned or devised without a surrender. (1 Atk. 388; 2 id. 38; 3 id. 73; 1 Ves. 121; 1 B. & C. 461). So, if an authority or power be given to a person, he may exercise it, and the vendee or appointee shall be in by the original instrument, without a new surrender to his use. (2 Wils. 400; Cro. Jac. 199).

‡ To enable a person to surrender, it is not necessary he should be in possession. (*Kren* v. *Kirby*, E. T. 1675, C. P. 2 Mod. 32; S. C. 1 Mod. 200; S. C. 1 Freem. 192; S. C. 2 Danv. 231). A surrenderee of copyholds cannot surrender before admittance, even though the surrender to him is presented; nor will his admittance subsequent to his surrender, make such surrender valid by relation. (Co. Copyh. s. 39; Tr. 87; Supp. s. 4; Sty. 146; 2 Bla. Com. 368; Poph. 127; S. C. 3 Bulst. 237, 240; Yelv. 144; S. C. 1 Brownl. 143; Co. Litt. 60. a., n. 2; 11 East, 246; Bridgm. 13; Rep. 81; Cro. Jac. 368; S. C. 2 Bulst. 336; 3 Cro. 29 a.; 2 Wils. 13; 6 Vin. Cop. E. b.). So, devisees of contingent remainders in a copyhold are incompetent to make a surrender of their interest. (*Doe* d. *Blacksell* v. *Tomlins*, E. T. 1809, K. B., 11 East, 185). So, if a person be wrongly admitted, he who has the right may release it, but he cannot make a surrender. (*Stone* v. *Exton*, M. T. 1678, K. B.; 2 Show. 83). But, any person having such an estate as may be the subject of a surrender, must be presumed capable of making it; and, therefore, if they are not, it must be from a personal incapacity; as, by being under age; but an infant heir may be ordered to surrender. (7 T. R. 103).

5. *As to the Parties to whom a Surrender may be made*.*

DOE *v.* MELLERSH, M. T. 1836. K. B. 1 *N. & P.* 30; S. C. 5. *A. & E.* 541.

A clerk may take surrenders* as well as the steward, if the custom.

To prove the surrender of the copyhold, the witness stated, that he was the clerk of the castle of Farnham, which was parcel of the manor of Farnham, and that his appointment to that office was by patent from the bishop of Winchester, who was lord of the manor; that patent, however, gave him no power in terms to take surrenders. He also stated, that, as clerk of the castle of Farnham, he was in the habit, concurrently with the steward of the manor, of taking surrenders of copyholds lying in that portion of it. It was objected, that the steward was the proper person to prove the surrender, and that the evidence of the clerk of the castle ought not to be received.

Lord *Abinger* having overruled the objection, a verdict was found for the lessor of the plaintiff.

Per Cur.—We do not know what "constituent part of the customary court of a manor" means. The office of clerk of the castle of Farnham appears in *some way* connected with the manor, and the officer appears to have been in the habit of taking surrenders in that part of the manor as the deputy of the steward.

See Parker v. *Kitt, T. T.* 1700, *K. B.*, 1 *Salk.* 95; *S. C.* 3 *Id.* 124; *S. C.* 1 *Com.* 84; *S. C.* 12 *Mod.* 466; *S. C.* 2 *Com. Dig.* 489; *S. C.* 1 *Ld. Raym.* 658; *S. C. Holt.* 221.

---

6. *As to the Place and Mode of making a Surrender†.*

DOE *d.* PRIESTLEY *v.* CALLOWAY, E. T. 1827. K. B. 6 *B. & C.* 484; S. C. 9 *D. & R.* 518.

The surrender and presentment ought to

THE premises for the recovery of which this action was brought, are copyhold tenements of inheritance, holden of the manor of

* The lord is, in all cases, capable of taking a surrender, when he is merely the medium of transfer. (*Pitt* v. *Moore*, H. T. 1680, K. B., 2 Show. 156; S. C. 2 Mod. 287; S. C. 2 Jones, 153; S. C. 1 Vent. 359; S. C. 1 Freem. 245). A steward, as incident to his office, may take a surrender out of court. (*Dudfield* v. *Andrews*, T. T. 1688, C. P.; 1 Salk. 184; semb. contr., *Owen* v. *Saunders*, H. T. 1691, K. B., 1 Ld. Raym. 158).

As the steward, in all such cases, acts only ministerially, if he be an infant, or non compos mentis, an idiot, a lunatic, an outlaw, or excommunicate, it matters not, as he is but custom's instrument. And if he acts ostensibly as steward, it is sufficient, though his authority afterwards prove counterfeit. (See Co. Copy. s. 41, Tr. 104).

† A surrender may be made either in or out of court. Little need be observed on a surrender in open court; it is a matter of common right, as incident to the copyholder's tenure. No special custom need be alleged for his doing so. (Co. Litt. 59. a.). Such surrender requires no presentment to effectuate it, but is immediately inrolled. (See 1 Watkins, p. 73). "When a surrender is made out of court into the hands of any who cannot thereupon make an admittance, or if no admittance be immediately made by a person enabled to admit, such surrender should be regularly presented." (See 1 Watkins, on Copyholds, p. 79). "When the lord, therefore, takes a surrender out of court, he may admit without any presentment." (Ibid. 80). "If the surrender be made into the hands of the tenants, or into those of the reeve or bailiff, or, in short, of any other person than the lord or steward, the surrender must be presented in court, in order to inform the lord or the steward that such presentment was taken;" (Co. Litt. 52. a); and should, when essential, be made in due time, according to the custom of the manor; (*Smith* v. *Paynton*, T. T. 1660, C. P., Carter, 73); as other-

Weedon Beck, in the county of Northampton. This cause was tried at the summer assizes at Northampton, in the year 1825, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case, and liberty was reserved to either party to turn this case into a special verdict. The premises, for the recovery of which this action was brought, are copyhold tenements of inheritance, holden of the manor of Weedon Beck, under the provost and fellows of Eton College, who are the lords of the manor. Thomas Bennett, hereinafter mentioned, was seised in fee of the said premises in 1790. A written document, brought from among the muniments of the manor of Weedon Beck, was given in evidence on the part of the plaintiff, which written document was as follows:—"This was a surrender out of Court, through the steward, from Thomas Bennett and his wife, of the premises in question to the plaintiff's lessor, Jane Hutton, in fee. There was a proviso for making the surrender void, on payment of 1,000*l.*, with interest at a given day." Under the signatures in the surrender, is written a memorandum in the following words:—"Presented by David Atcheson, foreman of the jury, at a court, held the 10th day of December, 1792." By the custom of the manor, surrenders may be taken out of court by a deputy steward, and surrenders so taken may be presented at any subsequent court. There is no limited time for presenting such surrenders; sometimes they are presented many years after the time they were made, although there may have been courts holden in the mean time. A written document on paper, and the two first sheets whereof were missing, brought from among the muniments of the manor of Weedon Beck, and relating to the proceedings of the court of 10th December, 1792, was given in evidence on the part of the plaintiff. The last-mentioned document, in that part which relates to the premises in question, begins thus:—"At this court it is found, by the homage, that on the 1st day of May, in the year of our Lord 1790, Thomas Bennett, late of Weedon Beck," &c., (setting out a surrender by the said Thomas Bennet, similar in terms to the one before mentioned). The document lastly above set out is indorsed with the words, "Draft of Court for Weedon Beck, 92," in the handwriting of one Smith, a clerk of Mr. Thomas Barnard, the then steward of the manor. Both Barnard and Smith are dead: Barnard died in 1796, Smith died in 1818. The document above set out was tendered in evidence on the part of the plaintiff, and objected to on the part of the defendant, but admitted by Justice *Holroyd*, subject to the opinion of the Court of King's Bench, both as to its admissibility and its legal effect. David Atcheson was foreman of a jury at a court holden for the manor of Weedon Beck on the 10th December, 1792. The surrender of Thomas Bennett in writing, above set out, was brought to him at the said court, as foreman of the jury, by John Harris, the then bailiff. He took it and presented it to Mr. Thomas Barnard, the steward, to be inrolled. The presentment was the act of the homage, and presented by Atcheson as foreman of the jury; and he, at the same time, wrote the

be duly inrolled by the steward on the court rolls, but an entry in the steward's handwriting, found amongst the lord's muniments, is evidence.

wise the surrender will become absolutely void; and must also accord with the surrender. (See Watkins, vol. i. p. 87; Scriven, 287; Co. Cop. s. 40; 2 Bl. Com. 369; Gilb. Ten. 369). As to drawing up the surrender, it is proper to mention that a custom, that the steward or deputy have the sole privilege of preparing surrenders, is good. (*Rex* v. *Rigge*, E. T. 1819, K. B., 2 B. & A. 550).

memorandum now appearing on the surrender, and above set out. Mr. Thomas Barnard, the steward of the manor, received the presentment from Atcheson, and demanded half-a-guinea for the inrolling of the said surrender, which was paid by John Harris, the then bailiff, on behalf of the mortgagee. The above-mentioned facts, as to the holding of the court on the 10th December, 1792, and as to all the proceedings which took place at that court, were proved by the said David Atcheson *from memory*. This evidence was objected to on the part of the defendant, but received, subject to the opinion of this Court as to its admissibility.

Per Cur.—It appeared that in this case the surrender had been made out of court, and had been presented, as it was stated, on the foot of the surrender, by the foreman of the homage jury. By the draft, as it was called, it would appear that that surrender had been made at the court in 1792. The surrender thus underwritten, and the rough draft indorsed, as it appeared by the case, had been found among the muniments of the manor. The question then was, whether, independent of the entry of 1820, there was legal and sufficient evidence of the presentment of the surrender in 1792. Littleton had been cited to shew that the copy of the court-roll was the only evidence upon which a copyhold tenant could rely to support his title; but the passage cited only went to shew "that proof by copy was the best mode of proving the title by pais, in contradistinction to proof by matter of record. Now, suppose all the rolls of a court were destroyed by fire, or lost through the carelessness of a steward, could it be said that therefore the copyhold tenants must be without any evidence to sustain their title? Undoubtedly it could not. The production of the roll or copy was not the only evidence of the title. The roll was not a matter of record; it was not conclusive as to its contents. In *Foster's case*, (1 Leon. 289), a mistake in the date of a surrender was allowed to be corrected. So, in the case of a surrender upon condition, if in the inrolment the condition by mistake be omitted, it may be corrected by evidence of the truth of the matter; (Dyer, 215 b.; *Winter* v. *Jeningham*, Gilb. Ten. 192, 254); and in the case of *Bunting* v. *Lepingwell*, (4 Co.Rep. 29), Lord *Coke* puts the case of a surrender made through the hands of a tenant who dies; and he says, "yet if it is upon good proof presented, it is well enough." In another case, (*Anonymous*, Lord Raym. 735), it was stated by Lord *Holt* that the rough draft of the steward was good evidence. In fact, the rough draft was the original, though the fairer transcribed copy was more convenient. For those reasons, (independent of the customs founded in this case, and upon which we give no decided opinion), we are of opinion that the evidence adduced to prove the presentment in 1792 was admissible, and that in point of effect it was sufficient.

---

7. *As to the Operation and Effect of a Surrender.**

* On a surrender being made, no estate passes in consequence to the lord, but it remains, till the nominee be admitted, in the surrenderor; (*Roe* d. *Cosh* v. *Loveless*, E. T. 1819, K. B., 2 B. & A. 453; S. P. *Doe* d. *Shewen* v. *Wroot*, E. T. 1804, K. B., 5 East, 132; S. C. 1 Smith, Rep. 363; S. P. *Doe* d. *Tofield* v. *Tofield*, E. T. 1809, K. B., 11 East, 246; S. P. *Roe* d. *Noden* v. *Griffiths*, M. T. 1766, K. B., 4 Burr. 1953; S. C. 1 Bl. 605; S. P. *Vaughan* d. *Atkins* v. *Atkins*, T. T.

8. *As to the Construction of a Surrender*.*

DOE *d.* WHALHEAD *v.* OSSINGBROOKE, E. T. 1824. C. P.
9 *Moore*, 633; S. C. 2 *Bing.* 70.

THE question raised was, whether entails of a copyhold parcel of the manors of Collingham Northby and Southby would be legally barred by surrender as well as by recovery suffered in the court of the lord of that manor. Seven distinct instances of barring by surrender were proved, and forty-seven of barring by recovery. The learned Judge at the trial having omitted to inform the jury that the two customs of barring entails by surrender and recovery were not inconsistent, and might be concurrently valid, the jury found that a recovery was necessary, and returned a verdict for the plaintiff.

There is nothing inconsistent in concurrent customs of having copyhold estates by *surrender* and *recovery;*

The Court (after the dictum of Justice *Dampier*, in *Doe* dem. *Bennet* v. *Jeffrey*, 2 M. & S. 92, had been adverted to,) pointed out the cases of *Everall* v. *Smalley*, (2 Stra. 1197), and *Doe* dem. *Wightwick* v. *Truby*, (2 Bl. 946), as conclusive that both the customs might stand together, and ordered the rule absolute.

1771, K. B., 5 Id. 2765; S. P. *Holdfast* v. *Clapham*, H. T. 1787, K. B., 1 T. R. 600; S. P. *Benson* v. *Scot*, E. T. 1693, K. B., 1 Salk. 185; S. C. 3 Lev. 385; S. C. Skin. 406; S. C. Comb. 233; S. C. 4 Mod. 251; S. C. 12 Id. 49); and he has a right to retain the possession, subject to his accounting for the mesne profits, if the surrenderee is afterwards admitted. (*Roe* d. *Jeffreys* v. *Hicks*, E. T. 1754; C. P. 2 Wils. 13; S. P. *Doe* d. *Bennington* v. *Hall*, M. T. 1812, K. B., 16 East, 208). The surrenderee cannot therefore maintain an action of tresspass; (Cro. Eliz. 439); nor can he surrender to another; (1 Brownl. 143; Yelv. 144; 10 East, 251; Gilb. Ten. 275, 281, &c.; Cro. Eliz. 504); so, as he has nothing to transfer, he can have nothing to forfeit. If he commit felony and be attainted, or if he commit waste, no forfeiture will ensue. (See 2 Wils. 13; Co. Cop., s. 15 to p. 137; Moore, 49; Gilb. Ten. 235 d.). The surrenderee is now, however, regarded as having such an interest in the premises as may be the object of a devise or assignment; (see 2 Chan. Rep. 4; Wils. Ch. Rep. 76; S. C. 2 Freem. 157; 1 T. R. 531, 601, 602; 2 Vin. 679; 1 Mod. 636; 2 Wils. 400; 1 P. Wms. 309); but an heir cannot devise before his admittance, for he has more than an equity. (See 1 Str. 487; sed vide, 55 Geo. 3, c. 192). So, if a surrender be made, it would seem the surrenderor may assign his interest, and the lord shall be compelled to admit. (See 2 T. R. 314; Gilb. Ten. 285; 4 Burr. 1952; 1 Bl. 605; 10 East. 208).

A. being the owner of a copyhold, made a conditional surrender of it in the year 1826 to W., to secure money lent. In 1832 A. sold the copyhold to G., and made a surrender of it to him absolutely. In 1833 G. was admitted tenant; and in 1834 W. was also admitted tenant:—Held, that, on ejectment brought by W., he was entitled to recover. (*Doe* v. *Gibbons*, 1836, N. P., 7 C. & P. 161).

* Surrenders of copyholds are in general governed by the same rules as common-law assurances. (*Idle* v. *Cook*, E. T. 1705, K. B., 11 Mod. 57; S. C. 2 Salk. 620; S. C. 2 Ld. Raym. 1144; S. C. 1 P. Wms. 70; guided by special custom, *Fisher* v. *Nicholls*, H. T. 1700, K. B., 3 Salk. 100). Where, therefore, an estate for life was limited to the father or mother only, and the subsequent limitation was to the heirs of both their bodies, the latter was viewed as a contingent remainder to the heirs; (*Frogmorton* d. *Robinson* v. *Wharrey*, M. T. 1771, C. P., 2 Bl. Rep. 728, S. C. 3 Wils. 125); and indeed, the same words are requisite to create certain estates of copyholds as are necessary to the creations of freeholds. (*Wright* v. *Kemp*, M. T. 1789, K. B., 3 T. R. 470). It seems, also, that words in a surrender of copyholds will receive the same construction as similar words in a conveyance to uses. (*Fisher* v. *Wiggs*, M. T. 1698, K. B., 12 Mod. 296; S. C. 1 Ld. Raym. 638; S. C. Com. 88, 92; S. C. 1 P. Wms. 14; S. C. Holt, 369; S. C. 1 Wils. 342; S. C. 1 Salk. 391; 3 Ibid. 206). It is also a general rule of construction, that where there is a sufficient certainty before, a subsequent mistake shall not injure the surrender. (*Goodright* d. *Lamb* v. *Pearce*, E. T. 1809, K. B., 11 East, 58); and, indeed, the intention of the parties will prevail in all cases. (*Roe* d. *Hucknall* v. *Foster*, E. T. 1808, K. B. 9 East, 405).

SNOOK *v.* SOUTHWOOD, T. T. 1836. K. B. 5 *A. & E.* 239.

and a custom to surrender land in trust is good.

IN this case the Court were of opinion that an immemorial custom in a manor to surrender lands in trust was valid.

---

9. *As to the Revocation of a Surrender.*

BODDINGTON *v.* ABERNETHY, T. T. 1826. K. B. 5 *B. & C.* 776; S. C. 1 *D. & R.* 626.

A surrender to uses, reserving power to revoke them, can be maintained, and is applicable to copyholds*.

ON a case sent from the Master of the Rolls, the question was, whether limitations to uses could be allowed in copyholds as they are in freeholds; or, in other words, whether a surrender to certain uses, reserving a power to revoke those uses afterwards, could be rendered available.

The Court took time to consider, and afterwards sent the following certificate:—"This case has been argued before us: we have considered, and are of opinion, that the plaintiff has an estate in fee simple, at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments, with the appurtenances, because a surrender to uses, reserving a power to revoke them, can be maintained."

---

10. *As to an erroneous Surrender*†.

11. *As to the Mode of enforcing a Surrender.*

REGINA *v.* PITT, E. T. 1839. Q. B. 2 *P. & D.* 385; S. C. 10 *A. & E.* 272.

After petition to the Court of Chancery for a surrender, the K. B. will not interfere.

A PARTY, claiming to be heir-at-law of the cestuique trust of a copyhold estate, petitioned the Court of Chancery under 11 Geo. 4 & 1 Will. 4, c. 60, who referred it to the Master to ascertain whether there was any heir-at-law of the last trustee, and on the Master's report made an order, stating that there was no such heir, and appointed R. G. to convey or surrender the legal estate to the petitioner.

The Court refused to interfere by mandamus, to compel the lord of the manor to accept a surrender from R. G., as the Court of Chancery had full jurisdiction, and was a fitter tribunal to investigate the matter.

(*b*) AS TO THE ADMISSION.

1. *As to its Nature, and when an Admission is necessary*‡.

* A surrender is not revocable when supported by an obligatory consideration; but a voluntary surrender may be revoked. (Kitch. 121; Lane, 99; Cowp. 705; Cro. Car. 273, 283; 6 Vin. Cop., Y.; Ib. T. a.; 1 Roll. Abr. 499, 500, E.; 2 Danv. 180, pl. 2; 1 Watk. on Cop. 87; Cowp. 703).

† If the presentment be truly made, and accord with the surrender, and yet be wrongly entered on the rolls, the rolls shall be amended.

‡ In admitting a tenant the lord is merely an instrument, whether the admittance be on a voluntary grant, or surrender, or descent. If a copyhold escheat to the lord, he may demise it by copy again; but such demise is entirely dependent upon his own inclination. But though the grant of such land by copy is depend-

DOE *v.* THOMPSON, M. T. 1836. K. B. 1 *N. & P.* 215; S. C. 5 *A. & E.* 532.

ON a question of admission and surrender—

The Court said it appeared on affidavit that the lessors of the plaintiff, who claimed as devisees under the will of one William Thompson, had been admitted at a court held by the steward of the manor as steward, and in the name of the present bishop, before any grant to him of the temporalities of the see of Ely, the copyhold land in question being holden of a manor which was parcel of the see. We are of opinion that, as the admission of the lessors of the plaintiff was made in pursuance of a surrender, or what by statute is equivalent thereto, and not as or in consequence of a voluntary grant by the lord, that the lord's title was immaterial.

An admission may be by statute by what is equivalent to a surrender.

DOE *d.* LORD CARLISLE *v.* TOWNS, T. T. 1831. K. B. 2 *B. & Ad.* 505.

BY the peculiar tenure within a manor the customary estates of inheritance might be conveyed by lease and release by the license of the lord, and passed by descent on the heir appearing and paying a fee to the steward for having his name inrolled.

But an inrolment descending to the heir, is not admittance within the Stamp Act.

Per Cur.—The 55 Geo. 3, c. 184, (the Stamp Act), imposes the duty on estates which pass by surrender and admittance, or admittance only, and not by deed; excluding the latter case for a very good reason—viz. that where there are deeds, the duty is imposed upon them specifically. The tenure in these cases is peculiar: it is not to hold merely according to the custom of the manor, as is generally the case with such estates in the north of England, but at the will of the lord, according to the custom of the manor. It is a customary of inheritance at will; it is alienated by customary bargain and sale, with the license of the lord indorsed; and it passes by the deed only without admittance. Where the lands pass by descent, they vest in the same manner as freehold property; and the right is not given by any admittance.

---

2. *As to the Proclamations previous to Admission*.*

dent upon his will, the admittance upon such grant is wholly regulated by the custom. By the grant the lord has signified his choice; and his office ceases when the custom immediately attaches, and imperiously prescribes the form. He becomes a mere instrument; he cannot vary the tenure or estate, the rents or services. (Co. Cop. s. 41, tr. 80; 2 Bl. Com. 370, ch. 22). In admittance on a descent or surrender, the lord is also a mere instrument. In the latter case he has only a power or authority to admit according to the surrender; he cannot vary the estate limited by the surrenderor, or grant it to a person whom the surrenderor has not designated. If he admit otherwise, however much his act may bind himself, it will be by no means obligatory on others. (4 Co. 28 b.; Co. Copyh. s. 41; 3 Burr. 1543; 4 Id. 1961). An admittance is only necessary to perfect a legal title where the surrender of the previous estate is necessary. (*Roe* d. *Coss* v. *Loveless*, E. T. 1817, K. B., 2 B. & Ald. 453). Where, therefore, the husband of a woman, tenant of a copyhold, is entitled by the custom to hold on at her death in the nature of a tenant by the curtesy, her admission is not a necessary ingredient, in a case where her title is, by the general law, complete without admission; (*Doe* d. *Milner* v. *Brightwen*, H. T. 1809, K. B., 10 East, 583); but the executor or administrator of a termor is compellable to be admitted. (*Earl of Bath* v. *Abney*, H. T. 1757, K. B., 1 Burr. 206).

* When a tenant dies, his death should be presented, and proclamation made for the party claiming title to the land to come in and be admitted. The pre-

3. *As to the Parties who may admit*.*

4. *As to the Parties entitled to be admitted†.*

DOE *d.* LEACH *v.* WHITAKER, H. T. 1834. K. B. 3 *N. & M.* 225; S. C. 5 *B. & Ad.* 409.

The grantee of a copyhold in reversion need not be admitted.

At at a court-baron, two tenements, pending a previous lease, were granted to R. and F., and seisin given, habendum for their lives, and the life of the longest liver successively, at the will, &c., and according, &c., at the yearly rents of 26*s.* 4*d.*, and 7*s.* all services, and a heriot when it should happen, &c.; R. was admitted, but that of F. respited until, &c. In 1825, F., who had survived R., surrendered to the lords, lessees of the manor, who, by their steward, granted the premises to L. and W., upon the same rents and services, "and a heriot for each of the said tenements;" and they were admitted tenants; this surrender and admittance were taken out of the manor, but was entered on the rolls as if done at a valid court.

The Court held, that there was no necessity that F. should have been admitted; the grantee of a copyhold in reversion having a perfect title by the grant without admittance.

REX *v.* LORD OF THE MANOR OF OUNDLE, E. T. 1834. K. B. 3 *N. & M.* 484, 496; S. C. 1 *Ad. & E.* 281.

And the admission to copyhold of a trustee or appointee is sufficient.

SURRENDER of a copyhold to such uses as A. shall appoint, and in default, and until such appointment to the use of A. A., without admittance, executes the power of appointment—

Per Cur.—The application of the doctrine, that an appointee takes under the original deed, was not disputed; and the cases of

sentment and proclamation may be in general terms. (*Doe* d. *Whitbread* v. *Jenney*, M. T. 1804, K. B., 5 East, 522; S. C. 2 Smith's Rep. 116; S. P. *Earl of Salisbury's case*, E. T. 1662, K. B,, 1 Lev. 63; S. C. 1 Keb. 287). If no person attends on the first proclamation made, the proclamation ought to conclude with a direction for a second proclamation to be made at the next court. At the next court the second proclamation is to be made accordingly, and in case of non-attendance, it should direct a third proclamation to be made at the succeeding court, when, should the heir or other person entitled not claim to be admitted after the third proclamation is made, a process may be issued by the lord or steward to the bailiff of the manor to seize the lands into the lord's hands for want of a tenant, as in the case from 1 Levinz, 63. These proceedings are duly entered on the rolls of the manor court, and should the admission ultimately take place, it is also in due form recorded. (See Forms in 1 Watkins, by Coventry, p. 293, &c.).

* In the case of descents and surrenders, the lord, the steward, or under-steward are merely instruments. They are compellable to admit, if ostensibly such, and the tenant is not to inquire into the legality of their title.

† A mandamus may be granted to admit the person who appears to have the legal estate, without regard to his equity. (*Rex* v. *Coggan*, E. T. 1805, K. B., 6 East, 431; S. C. 2 Smith's Rep. 417). But though the lord shall not be permitted to defeat the right of the surrenderor with respect to the nomination of a legal successor in the tenancy, yet, on the other hand, the tenant must not be permitted to prejudice the rights of his lord. (See Bro. Fealty, pl. 15; Co. Litt. 66 b; 2 Ld. Raym. 864; Co. Cop. s. 4, tr. 113, 114; 1 Watkins on Cop., by Cov. p. 299, n.; and 1 Scriven., 340). And if one of a number of parties entitled to a copyhold estate offer to be admitted, the lord cannot refuse to admit him, no prejudice arising therefrom, as he has his remedy for the recovery of what amount of fines may have been incurred by the others. (2 Wils. 162).

Beale v. *Shepherd*, (Cro. Jac. 199), and *Holder* v. *The Lord of the Manor of Haughley*, (2 Wils. 400), are authorities upon that point. But a distinction was strongly insisted upon between a trustee to sell without any interest and a trustee for sale coupled with an interest. It seems to us, that these premises may be correct, without leading to the conclusion that was wished to be drawn from them. The estate was not, in any of the cases, in abeyance; so here the trustee remained tenant to the lord until somebody was appointed under the power of appointment to A.; but as he has chosen to execute the power of appointment, his appointee is entitled to be admitted without himself being previously admitted. What might have been the effect of A. having been admitted before he executed the power of appointment, whether he could have afterwards executed the power of appointment, and so have conveyed the estate without surrendering, it is unnecessary for the Court to decide.

DOE *d.* DANSON *v.* PARKE, T. T. 1837. K. B. 4 *Ad. & E.* 816.

So, the assignees of a bankrupt copyholder may be admitted;

A BANKRUPT, at the time of his bankruptcy, was in possession of customary freeholds to which he had been admitted, and which passed by bargain and sale upon surrender and admittance. The commissioners assigned the premises to his assignees, who were not admitted until after his death. They then brought an ejectment, laying demises in the name of the heir of the bankrupt after his death, and also in their own names, but prior to the date of their admittance—

The Court held, that they were entitled to recover on the one demise or the other.

DOE *d.* SMITH *v.* GLENFIELD, E. T. 1835. *C. P.* 1 *Scott*, 669; S. C. 1 *Bing. N. S.* 725.

but copyholds pass to the assignee of an insolvent debtor, without entry on the roll.

IN ejectment, to recover copyhold property by the assignee of an insolvent—

The Court held, it is not necessary that the conveyance and assignment from the provisional to the general assignee (lessor of the plaintiff) should be entered on the court rolls. It is sufficient that such conveyance should be entered in the minute book of the steward. The entry of such conveyance on the roll is only requisite under the 20th sect. of 7 Geo. 4, c. 57*, (Insolvent Debtors Act), in case of a sale of the property in question.

REX *v.* HEXHAM, M. T. 1836. K. B. 1 *N. & P.* 53.

If A. and B. claim admission, the lord must admit both, so as to try their title.

A RULE had been obtained, calling on the lord of the manor and his steward to shew cause why he should not admit one Richard Errington to certain copyhold tenements, within and parcel of the manor of Hexham. The affidavits on which the rule had been granted stated, very particularly, the mode in which the estates in question were settled by the will of Elizabeth Armstrong, through whose hands they had passed; and that under the settlement, they had, on the death of William Scot Ord, descended upon the right heir of Elizabeth Armstrong. In June, 1835, Richard Errington

* Now repealed by the 1 & 2 Vict. c. 110.

claimed to be such right heir, attended a manor court, and appeared to prove that he was the right heir. The homage on that occasion found him to be the right heir; but the steward refused to admit him. The steward, in his affidavit, admitted that the homage had found Richard Errington to be the right heir; but stated, that the evidence by the prosecutor was, in his opinion, not conclusive. He also stated entries and admissions from the court roll at variance with the statement of title in the affidavit of the applicant, and the admission of another claimant.

Per Cur.—We think that the rule should be made absolute. We should like to have an authority. But, on principle, it appears to us, that the writ should issue, otherwise in some cases the steward might shut out one party from making his claim.

---

5. *As to the Place where it is to be made*.*

6. *As to the Mode in which it is to be made†.*

DOE *d.* LEACH *v.* WHITAKER, H. T. 1834. K. B. 3 *N. & M.* 225; *S. C.* 5 *B. & Ad.* 409; *Abr. ante, p.* 124.

The admission of a tenant should be notified to the other tenants.

IN this case the Court held, that although it is necessary, in order to make a person tenant by copy of court roll, that the admission should be notified to the tenants at the next or some other court as the custom may be, that the proceedings entered by the steward, as if done at a court, conveyed sufficient information to the tenants after the admittance; although through an incorrect medium it was sufficient.

---

7. *As to the Effect of the Admission‡.*

* The lord or his steward may admit, as well out of court as in, since the approbation, or even the testimony of the former tenants, is not requisite. The admission must be, however, notified at the next court day, for the information of the tenants. (Watk. n. cxi. to Gilb. Ten. 448, 449). It is said, indeed, (Bro. Court Bar. pl. 22; 22 Co. Cop. s. 46, p. 107; Kitch. 82 b), that an under-steward cannot admit out of court. (Sed quære; see 1 Ld. Raym. 659; 1 Salk. 184). It was, however, settled, that, although a lord may, a steward cannot admit out of the manor without a special custom. (See Cro. Car. 367; 4 Co. 26 b, 27 a; Co. Litt. 58. a; 1 Ld. Raym. 76).

† An admittance may be either express or implied. (1 Roll. Abr. 505, Copyh. pl. 2; 3 Bulst. 217; 3 Bulst. 239; Dyer, 292 a, pl. 68; Dyer, 222 a, pl. 68). But it would be imprudent in these cases to forego an actual admittance, (*Brown* v. *Dyer*, E. T. 1706, K. B., 11 Mod. 73), as the surrenderee has no transmissible or legal interest till admission. (*Rawlinson* v. *Green*, 3 Bulst. 237; S. P. *Doe* d. *Tofield* v. *Tofield*, 11 East, 246). But as the lord is not obliged to admit the tenant in his own person, it is not essential that the tenant be personally admitted, (*Blunt* v. *Clark*, T. T. 1657, K. B., 2 Sid. 61), unless a custom exists to the contrary. (*Wymer* v. *Page*, M. T. 1814, K. B., 1 Stark. N. P. C. 9).

‡ A surrenderee is not tenant for any purpose before admissions. (*Phillibroon* v. *Ryland*, E. T. 1726, K. B., 8 Mod. Rep. 352; S. C. 2 Ld. Raym. 13; S. C. 1 Stra. 624; S. P. *Blackburn* v. *Graves*, M. T. 1678, K. B., 1 Mod. 102; S. C. 1 Vent. 260; S. C. 3 Keb. 263, 329; S. C. 2 Lev. 107). Unless the copyholder take by the act of the lord. (*Keen* v. *Kirby*, E. T. 1675; C. P. 1 Mod. 200; S. C. Carter, 237; S. C. 1 Freem. 192; S. C. 2 Mod. 32). On the death of his ancestor, the heir may enter and take the profits; (4 Co. 22 b, 23 b); and maintain an action for any trespass done to his possession. (4 Co. 23 b). He may also make a lease of the copyhold, as warranted by custom, and on such lease an ejectment may be brought; (1 Leon. 100; Moore, 596, Cro. J. 403); but, before his admission, the

8. *As to an erroneous Admission*.*

VI. RELATIVE TO THE DESTRUCTION OF COPYHOLD INTERESTS.

(*a*) By forfeiture†.

Doe *d.* Grubb *v.* Burlington, Earl of, M. T. 1833. K. B. 2 *N. & M.* 534; S. C. 5 *B. & Ad.* 507.

Waste, unless injurious to the inheritance, is no forfeiture‡.

This was was an ejectment to recover possession of a farm, held by copy of court roll of the manor of Princes Resborough, in the county of Bucks. The ground upon which the lessor of the plain-

heir is not entitled to be sworn on the homage, nor can he maintain a plaint in the nature of an assize. (Co. Cop. s. 41, Tr. 94; Kitch. s. 19; Gilb. Ten. 287). If the heir die before admittance, his heir may enter, (4 Co. 23 b); and such death will not prevent the widow from being endowed, nor the husband from being tenant by the curtesy, (Co. Cop. s. 41); and if the heir die, after having entered, there shall be a possessio fratris, even before admittance. (Watk. on Desc. 96). The heir may even surrender to the use of another, on satisfying the lord for his fine. (4 Co. 22 b; Ketch 162; Cro. Jac. 36; Cro. Eliz. 662; Yelv. 145; 3 Lev. 327, 1 Com. 241; 1 Anst. 11).

* An erroneous admission is wholly void, and the lord or steward must afterwards admit according to the surrender. (*Grantham* v. *Copley*, E. T. 1672, K. B., 2 Saund. 422),

† When the customary heir or surrenderee neglects to come in and be admitted, the lord may, by special custom, make an absolute seizure. (*Doe* d. *Tarrant* v. *Hellier*, E. T. 1789, K. B., 3 T. R. 162; S. P. *Lord Salisbury's case*, 1 Keb. 287). So, if a copyholder be attainted of treason or felony, his estate becomes forfeited to the lord. (*Benson* v. *Strode*, H. T. 1680, K. B., 2 Show. 150; S. C. Skin. 829; S. C. Pollexf. 615; S. C. 2 Jones, 189; sed vide *Jory* v. *Pawley*, H. T. 1688, K. B., 1 Lev. 263; S. C. 2 Keb. 457, 466). Outlawry is also a cause of forfeiture of copyholds. (*Rex* v. *Budd*, T. T. 1758, Ex., Park, 190). So, if the copyholder convey any common-law interest in his lands to another, it is a forfeiture. Thus, if he make a feoffment with livery, (*Eastcourt* v. *Weeks*, T. T. 1688, C. P., 1 Salk. 186), or levy a fine, (*Doe* d. *Tarrant* v. *Hellier*, E. T. 1789, K. B., 3 T. R. 162), or make leases of the copyhold land not warranted by custom, unless by license of the lord. (*Richards* v. *Sely*, E. T. 1676, C. P., 2 Mod. Rep. 79; S. C. 3 Keb. 638).

All persons of sufficient understanding may forfeit a copyhold, but a person of non-sane memory, an idiot, or a lunatic, is unable to forfeit. So, an infant under the age of fourteen, because he wants discretion; but an infant at the age of discretion may forfeit his copyhold, not by offences proceeding from negligence or ignorance, but by such as proceed from contempt. So, a married woman cannot by any act of her own forfeit her copyhold, because she is not sui generis sed sub potestate viri, unless it be for treason or felony. (Co. Cop. s. 59, Tr. 136; 1 Hawk. P. C., c. 1, s. 11). If a copyholder for life commit a forfeiture, the lord and not the remainderman must take advantage of it; (*Keen* v. *Kirby*, E. T. 1765; C. P. 1 Mod. 200; S. C. Carth. 237; S. C. 1 Freem. 192; S. C. 5 Mod. 32; S. P. *Wade* v. *Bache*, E. T. 1668, K. B., 1 Saund. 151; S. C. 1 Sid. 360; S. C. 2 Keb. 341; S. P. *Smartle* v. *Penhallow*, 2 Lord Raym. 1000; S. C. 1 Salk. 189; S. C. 6 Mod. 67); unless a contrary rule is given effect to by the terms of the lord's grant; (*Strode* v. *Dennison*, H. T. 1682, K. B., 3 Lev. 94; 2 Show. 150; S. C. T. Jon. 189; S. C. Skin. 8, 29; S. C. Pollexfen, 619). Any person who is lord by right may dispense with a forfeiture, but a lord by wrong cannot purge a forfeiture as to a rightful lord. (*Milfax* v. *Baker*, E. T. 1660, K. B., 1 Lev. 26; S. C. 1 Keb. 25).

‡ A copyholder, though a tenant at will, is, unlike such tenant, liable for permissive as well as voluntary waste. If a copyholder, therefore, suffer a house to become ruinous, the estate becomes again the lord's property. (*Eastcourt* v. *Weeks*, T. T. 1698, K. B., 1 Salk. 186; S. C. Lutw. 803).

tiff proceded, was an alleged act of waste, committed by the tenant, in the removal of a barn off the estate held by the tenant. The cause was first tried before Mr. Baron *Garrow*, when a verdict was found for the plaintiff, which verdict was set aside, and a new trial granted; on the second trial, a verdict was found for the plaintiff, with leave for the defendant to move to enter a verdict in his favour.

The Court held:—1st. No act of waste subjects a tenant to forfeiture, unless the act be injurious to the inheritance. 2nd.—But the question, whether the act be injurious, is not, of necessity, decided by the question as to the value of the estate after the act has been done: *ex. gr.* it may be an act which would increase the value of the estate, yet be injurious to the inheritance, as it may impair the evidence of the title. In such case the act would be waste.

DOE *d.* EVANS *v.* EVANS, T. T. 1826. K. B. 5 *B. & C.* 584; S. C. 8 *D. & R.* 399.

Where a copyhold is forfeited by attainder, the lord should take a step to divest such party of the estate.

IN ejectment. It appeared in evidence that the premises in question were held by copy of court roll bearing date the 26th November, 1783. This copy shewed that F. King and J. Evans, the father of the lessor of the plaintiff, surrendered their lands and took a new grant to F. King for life, and after his decease to his wife, Jane Evans, J. Evans, their son, (the lessor of the plaintiff), and T. Evans, their son, (the defendant), as joint tenants for the term of their lives and the life of the longest liver. F. King died in 1807, and T. Evans, the father, in 1818: Jane Evans was still alive. In 1818, J. Evans, the lessor of the plaintiff, was convicted of larceny and sentenced to seven years' transportation. In 1814 he was capitally convicted of being at large in this country before the period of his transportation had expired, and was thereupon attainted, but he received a pardon under the sign manual on condition of being imprisoned for two years, which time expired before the day of the demise. The formal ouster was not denied by defendant; but on his behalf it was objected, that by the attainder the lessor of the plaintiff was rendered incapable of making a demise. Justice *Gaselee* reserved this question, and the plaintiff had a verdict, subject to a motion to enter a nonsuit. A rule for that purpose having been accordingly obtained—

Per Cur.—No doubt the pardon by virtue of the 6 Geo. 4, c. 25, restored him to his competency to hold lands; but it has been contended that it could not divest an interest which had previously been vested in another. That introduces another question, whether after the forfeiture it was necessary that any thing should be done by the lord to vest the estate in himself. At present, we think, that some step by the lord was necessary; but if upon consideration we alter our opinion we will mention the case again.

REX *v.* MILDMAY, M. T. 1833. K. B. 2 *N. & M.* 778; S. C. 5 *B. & Ad.* 254.

And a party to whom a copyhold is surrendered before the tenant is convicted of

THE question was, whether, if a copyhold tenant surrender his estate to the use of another, and afterwards commits and is convicted of felony before admittance of the surrenderee, the estate is by the custom forfeited to the lord.

Per Cur.—After a careful examination of the case, we are of opin-

felony must be previously admitted, if not the copyhold is forfeited.

ion, that the estate is by the custom forfeited to the lord, and that a peremptory mandamus ought not to issue. It is conceded, that, as between the surrenderor and surrenderee, the latter cannot be prejudiced by any act done by the former subsequently to the surrender, but is entitled to be admitted to the estate free from all mesne incumbrances. It is conceded also, that the surrenderor, until the admittance of the surrenderee, continues tenant to the lord for all purposes of service. The estate therefore does not by the surrender vest in the lord. It is conceded also that the surrenderee before admittance takes nothing, but that on admittance he is in by relation from the time of the surrender, as between him and the surrenderor-tenant, yet he has not been tenant in the mean time; for it is held in *Doe* d. *Jefferies* v. *Hicks*, (2 Wils. 15; S. C. 1 Kenyon, 110), that if he be attainted in the mean time, the lord will not take by forfeiture. We are of opinion, that, as the surrenderor is conceded to be tenant for all purposes of service until the admittance of the surrenderee, so he is also tenant for the purpose of forfeiting.

DOE *d.* BOVER *v.* TRUEMAN, H. T. 1831. K. B. 1 *B. & Ad.* 736.

But the omission of a lord of the manor to seize for forfeiture does not deprive the succeeding lord of his right.

IN this case the question was, whether the succeeding lord of a manor can avail himself of a right to seize copyhold land, quousque, which accrued to the preceding lord on default of the heir of the copyholder coming in to be admitted.

Per Cur.—We are of opinion that the succeeding lord may avail himself of such right of seizure. It appears from several cases, and also from several text books, that no lord can take advantage of a forfeiture but he who is lord at the time of the forfeiture committed, except where the act of forfeiture destroys the estate. (*Lady Montagu's case*, Cro. Jac. 301, as to a lease not warranted by custom; *Chamberlain* v. *Drake*, 2 Siderfin, 8, as to waste; *Eastcourt* v. *Weeks*, 1 Salk. 186; S. C. 1 Lutw. 799; *Bird* v. *Kirkby*, 1 Mod. 199; S. C. Carter, 237; Gilbert's Tenures, 249; Coke's Complete Copyholder, sect. 60). There is an anonymous case in Freem. 516, which appears to be the same as *Eastcourt* v. *Weeks*, and where *Treby* took this difference, that in some cases an heir might take advantage of a forfeiture, but that was of such acts as were as well extinguishments of the copyhold estate as forfeitures: as, where a copyholder levied a fine, suffered a recovery, or made a feoffment with livery; then the copyhold estate was extinguished, because the copyholder had taken upon himself to convey the freehold, which was inconsistent with a copyhold estate. But, where a copyholder makes a lease for years, or commits waste, there ensue forfeitures at the election of the lord; and therefore, if the lord takes no advantage of them by entry, but doth any act which admits the tenant to be a copyholder, the forfeiture is purged; as, if he receives the rent, or accepts a surrender, or amerces him in his court: but in the other case, no act of the lord can purge the forfeiture, because, in case of a fine, recovery, &c., the copyhold is utterly extinguished; therefore, if the lord to whom the wrong is done doth not make his election to make it a forfeiture by entry, his heir shall never take advantage of it.

(*b*) By extinguishment*.

(*c*) Enfranchisement†.

VII. AS TO THE RELATIVE SITUATION OF LORD AND TENANT.

(*a*) As to the lord.

1. *Connected with the Right of Property*‡.

Regina *v.* Hal, M. T. 1838. Q. B. 1 *P. & D.* 293.

The Court, it seems, will not compel the lord to grant a license to demise.

By the custom of a manor, the tenant had a right to demise for any period not longer than three years, without a license; and for every license to demise for a longer period, the lord was entitled to 4*d.* for every year of the term granted. Several licenses were shewn, the earliest in 1729, under which various terms of years, not exceed-

* To create an extinguishment of copyhold property by its being merged in a freehold, the freehold and copyhold interest must be of the same premises: and the interests must be united in the same person—for while they continue separate no extinguishment can take place, (2 Co. 16 b; 4 Id. 24 b; Cro. Jac. 573; Hob. 181; 2 Roll. Rep. 178)—and in the same right. (Co. Cop. s. 62).

† The next mode of extinguishing a copyhold is by enfranchisement, by which the tenure is changed from base to free; and this will be presumed, even against the Crown, to support a very long possession. (*Roe* d. *Johnson* v. *Ireland*, H. T. 1809, K. B., 11 East, 280). An enfranchisement is effected by the lord conveying to the tenant the freehold of the premises held by copy. It may also take place from the lord's releasing to the copyholder his seignorial rights and services; so, if the lord ratify and confirm the customary estate to the tenant, and grant that it shall be free from all customary services due in respect of such tenancy. (*Doe* d. *Reay* v. *Huntingdon*, M. T. 1803, K. B., 4 East, 271). To enable the lord to enfranchise absolutely, he must have it in his power to convey the fee-simple of the freehold interest. A lord having only a partial interest in the manor, cannot enfranchise in fee; (1 Watk. 363); unless, indeed, such particular tenant of the manor have a power to enfranchise in fee reserved to him, on the creation of his estate, by a person having the fee-simple of the manor; (1 Jac. & Walk. 611; and see 2 Roll. Abr. 271; Cro. Eliz. 459); but it is not essential that the conveyance of the freehold to the tenant be immediately from the lord; for if the lord convey the freehold to a stranger, and the stranger convey it to the copyholder, the base tenure will be destroyed. (1 Watk. 362). Immediately on the lands becoming enfranchised they become severed from the manor, and the lord divested of his power. The tenure, therefore, being extinct as to the enfranchising lord, he cannot consequently reserve to himself any services on such enfranchisement. (*Bradshaw* v. *Lawson*, M. T. 1791, K. B., 4 T. R. 443). Enfranchisement was the chief object of the 4 & 5 Vict., ante, p. 102, which statute points out the mode of effecting an enfranchisement. Before the statute, such mode was adopted as to convey the freehold of the premises, by feoffment, bargain and sale, or the like. (1 Watk. 365).

‡ The freehold of all lands granted by copy remains in the lord, who consequently continues to enjoy a variety of rights over those lands. Thus, in the absence of a special custom, the right to the timber, mines, and minerals, continues in the lord; but the lord of a manor is not authorized to enter on a copyhold of inheritance and cut timber for his own use, if there be no custom in the manor; (*Whitechurch* v. *Holworthy*, M. T. 1815, K. B., 4 M. & S. 340; S. P. *Ashmond* v. *Ranger*, E. T. 1700, K. B., 12 Mod. 378; S. C. 11 Id. 18; S. C. Com. 71; S. C. 1 Lord Raym. 551; S. C. Holt, 162; S. C. Fort. 152); and on the same principle, the lord cannot enter copyholds to work the mines underneath, unless authorized by special custom. (*Bourne* v. *Taylor*, T. T. 1808, K. B., 10 East, 188; S. P. *Player* v. *Roberts*, W. Jon. 243).

ing forty-seven, had been granted. Under these circumstances, the Court discharged a rule for a mandamus to the lord to grant a license to demise for two several terms of forty and twenty-one years.

---

2. To appoint a Steward.*

3. Of the Manor Courts and Courts-Baron.

BARTLETT *v.* DOWNES, H. T. 1825. K. B. 3 *B. & C.* 616; S. C. 5 *D. & R.* 526; S. C. 1 *C. & P.* 522.

A steward of the manor court may be appointed for the life of the grantee, and the appointment binds future owners of the manor†.

ASSUMPSIT for money had and received, brought by the plaintiff for the purpose of trying the right of the defendant to the office of steward of a manor court. It appeared that the office had been by deed granted to the plaintiff, for the term of his life, by the late lady of the manor, and that the defendant had been appointed by the present lord of the manor, who was the devisee of the late lady of the manor. It also appeared that the defendant conceived that every lord had a right to appoint his own steward; and moreover, that the late lady of the manor had not the legal estate in the manor, because there was an outstanding term which had not been surrendered; but it appeared that it had done its duty, and a deed was produced that contained a recital that all terms had been surrendered, but there was not any mention of this particular term. *Abbott*, C. J., directed the jury to presume that the term of years had been surrendered; and they found a verdict for the plaintiff. On motion for a new trial—

* As an incident to the lordship of the manor, the lord may appoint a steward. When a steward is appointed by deed, he becomes possessed of the office dum bene se gesserit. In one case it is said that the office of steward may be entailed; (7 Co. 13 b.); and in Sir Edward Coke's time the office seems to have been capable of descent. (Co. Tr. 107). The office may be, however, in all cases forfeited by misuser, nonuser, or refuser, which three cases of forfeiture are thus stated by Coke. (Cop. s. 45, tr. 106):—1st. "By abuser: as, if the steward burn the court-rolls, or if he taketh a bribe to wink at any offence, or use partiality in any cause depending before him. 2dly. By nonuser: as, if the steward, by his patent being tied to keep court at certain times of the year, without request to be made by the lord, faileth, and by his failure the lord receive any prejudice, this is a forfeiture; but if the lord be not damnified, then this nonuser is no forfeiture. 3rdly. By refuser: as, if the steward, tied by his patent to keep court upon a demand or request to be made by the lord, if the lord demandeth or requesteth him to keep a court, and he faileth, this is a forfeiture, though the lord be thereby nothing damnified." And it may here be noticed that a court of law will exercise a summary jurisdiction over a steward, an attorney of the court. (Co. Cop. s. 62). Should the steward be disturbed in his office, his remedy is by action on the case. (Cro. Eliz. 335).

It is not clearly settled that a steward can appoint a deputy without a custom or express warrant in his own authority. Sir Edward Coke says he surely cannot, for it is an office of knowledge, trust, and discretion, except in cases of necessity; as if the stewardship descend on an infant, he may make a deputy, because of his incapacity to execute it personally. (Co. Cop. s. 46, tr. 107). In most of the cases that have occurred there has either been a custom, or the chief steward has been authorized by deed to execute his office by himself or his deputy's deputy. (1 Leon. 289; 4 Id. 215; 1 Ld. Raym. 660; 1 Salk. 96; 1 Com. 84; 12 Mod. 470; 1 Leon. 227; Cro. Eliz. 48).

† It is a good custom in a manor for a steward to prepare the surrenders, and slight evidence will support such custom; it being more reasonable that the steward should prepare them for the copyholders. (*Reg.* v. *Bishop's Stoke, Lord of Manor of*, T. T., 1840, B. C., 8 Dowl. P. C. 608).

Per Cur.—We have taken time to consider whether we ought to grant or refuse a rule for a new trial; and having now considered the matter, we are of opinion that we ought not to grant a new trial. The office of steward of a manor court may be granted by deed for life; and the devisee of the grantor cannot deprive him of his office. The jury may be directed to presume that a term of years has been surrendered or been extinguished, if it is no longer of any beneficial use; and there is a recital in a deed that all terms for years have been surrendered, although no mention is made of that particular term.

DOE *d.* LEACH *v.* WHITAKER, H. T. 1834. K. B. 3 *N. & M.* 225; S. C. 5 *B. & Ad.* 409; *Ab.* ante, p. 124.

The courts-baron should be held within the manor.

IN this case the Court decided that a court-baron of freeholders cannot be held out of the manor, nor a customary court, without special custom to warrant it; but that, though the court be a void court, it would only affect things which are required to be done at a court; and that, as the lord might grant to or admit a tenant out of the court, or even out of the manor, which the steward in the *mere* character of steward could not, yet that, as the steward, by the deed of the lessees appointing him, had a special authority to act as fully as the lessees of the manor could do, his grants might operate as grants by the attorney of the lord, and be therefore valid.

(*b*) AS TO THE TENANT.

1. *As to his Duties.*

1.—*Connected with the Payment of Fines*.*

WILSON *v.* HOARE, E. T. 1839. Q. B. 2 *P. & D.* 659; S. C. 10 *Ad. & E.* 236.

Where the jury find that the fine on admission is an "arbitrary" fine:—Held, that it did not mean the fine was unreasonable.

IN this case the jury found that an arbitrary fine was payable on a grant by the custom of the manor, but that the fine claimed on the addition of lives was unreasonable.

The Court held that an arbitrary fine meant a reasonable fine; and that the principle of calculating the fine on addition of several lives, by taking two years improved value on the first, and halving it for the second, and halving the half for the third, and so on in geometrical progression, was a reasonable fine.

WILSON *v.* HOARE, E. T. 1831. K. B. 2 *B. & Ad.* 350.

Whenever the trustees of a charity were reduced to five, a new admission was requisite:—Held, that the fine payable was to be half

BY the terms of a decree regulating charity lands, which were copyhold, whenever fourteen trustees were reduced to five a new commission was requisite, and a re-admission. On the question how the fine was to be assessed—

Per Cur.—Our opinion is, that the proper mode of estimating the fine is to take for the second life half the sum taken for the first; for the third, half the sum taken for the second; and for the fourth half that which is taken for the third, and so on. The effect

* By the custom of many manors, fines are due from copyholders on every change of the lord which happens by the act of God; but such rule cannot exist where the change takes place by any act of the party. (*Duke of Somerset* v. *France*, M. T. 1725, K. B., 1 Stra. 654; S. C. Fortescue, 41).

of that will be, that you can never quite arrive at double the sum taken upon the first life, whereas the fine at present assessed very much exceeds that; for the principle on which it was assessed was this: two years' value was taken for the first life, half of that for the second life, a third for the third life, a fourth for the fourth, and so on to the ninth life. The rule that we have laid down appears to have been the rule approved of in *Taylor* v. *Pembroke,* and is referred to in the *Earl of Bath* v. *Abney,* (1 Burr. 211), though it is not very accurately stated either in the margin of the report or in Watkins's Treatise on Copyholds. There is an inaccurate use of the word "sesqui:" it is said that the fine for two lives is the sesqui of that taken for one, and so far it is correct; and that the fine for three is the sesqui of that taken for two, which is incorrect. The meaning is plain enough—that the sum taken for the third life is the half of that taken for the second. of each preceding fine.

REX *v.* DULLINGHAM, LADY OF THE MANOR OF, M. T. 1838. Q. B. 1 *P. & D.* 172.

UPON a devise of copyhold for life, and a full fine paid upon the admission of the tenant for life, the heir of the devisor had surrendered his reversion— The surrenderee of the heir-at-law of the devisor must pay the descent fine before admittance.

The Court held, that the lord might refuse admittance to the surrenderee, unless on payment of the fines payable in respect of the descent on the heir.

PHYPERS *v.* EBWIN, M. T. 1836. C. P. 3 *Bing. N. S.* 250; S. C. 3 *Scott,* 634.

A DEVISEE in fee of a copyhold tenement, on his admittance, paid the lord the full fine due by the custom of the manor; he afterwards made a surrender of the premises to the use of himself and his assigns for life, with divers remainders over; and on being admitted tenant for life of the surrendered premises, he paid a fine of 1*s.* to the lord. No fine is payable on the admission of the remainder-man,

The Court held, that, in the absence of a custom within the manor to sanction it, no fine was payable on the admission of the remainder-man.

ELY, DEAN OF, *v.* CALDECOTT, E. T. 1831. C. P. 8 *Bing.* 439; S. C. 1 *M. & Scott,* 633.

THIS was an action for the recovery of a fine, as due to the lords of the manor, on the admission of a copyhold remainder-man. It appeared that a fine had been paid on the admission of the tenant for life, and the question was, whether one was also payable when the remainder-man comes into possession. where a tenant for life is admitted, and a full fine paid,

The Court held, that the remainder-man was not subject to another fine.

PHYPERS *v.* EBWIN, M. T. 1836. C. P. 3 *Bing. N. S.* 250; S. C. 3 *Scott,* 634.

THIS was an action for trespass upon certain closes, named and described by metes and bounds in the declaration, to which the defendant pleaded—1st., that the right of possession in which, &c., was not in plaintiff; and, 2ndly, a special plea of justification, that in the absence of a custom to the contrary.

defendant, as bailiff, and under a warrant from the steward of the manor of Crowlands, in the county of Cambridge, seized the closes in which, &c., quousque, viz., in the mean time, and until some person or persons should appear and make good his or their claim to be admitted a tenant thereto at a court of the lord of the manor of Crowlands. To this plea the plaintiff replied, that one John Purchas was admitted to the closes as tenant for life, with remainder over; and that one Frances Anne Purchas is seized in remainder, under that admittance.

Per Cur.—The admittance of tenant for life, being the admittance of him in remainder, the latter is not, on the death of the tenant for life, bound to come in and be admitted, and, consequently, pay a fine to the lord, except there is a special custom of the manor to such effect, or the lord at the time of the admittance has apportioned the fine between the tenant for life and the remainder-man, although the fine paid by the tenant for life upon his admission be merely nominal.

2.—*Connected with Heriots*.*

GARLAND *v.* JEKYLL, T. T. 1824. C. P. 2 *Bing.* 273.

If one heriot be chargeable upon copyhold, and several, if divided—if it becomes united again, only one heriot can be demanded.

A SPECIAL case stated, "that in the manor of Weeks Park Hall, in the county of Essex, there are, and from time immemorial have been, divers customary and heriotable copyhold tenements of inheritance, held by the respective tenants thereof, unto them and their heirs and assigns, by the rod, and by copy of the court-rolls of the said manor, of the lord of the said manor for the time being, at the will of the lord, according to the custom of the manor." Then the case states, that "there is, and from time immemorial has been, a custom within the said manor, for the lord of the said manor for the time being, upon the death of every copyhold tenant of any customary and heriotable copyhold tenement, within the said manor, to have, take, and seize for heriots in respect thereof, so many of the beasts which were of such customary and heriotable copyhold tenant, at the time of his death, as the number of heriots due in respect of such customary and heriotable copyhold tenements did at that time amount to." Then, it is stated, that it was the custom for the lord of the manor to take and seize for such heriots the best beasts of such tenant, or such as the lord of the manor shall elect to take and seize as the best beasts. The case states, that in the year 1735, Samuel Warren was a copyhold tenant of two customary and

* With respect to heriots, important alterations are introduced in the 4 & 5 Vict. ante, p. 106. Besides a fine, there is also a custom in many manors, that upon the death of every copyholder, though only for life, the lord becomes entitled to his best beast, or averium. So, by custom, it may be due upon the surrender or alienation of the tenant. In some manors, it is the best chattel, under which a jewel or piece of plate is included; but it is always a personal chattel, which, immediately on the death of the tenant, being ascertained by the option of the lord, becomes vested in him as his property, and is no charge on the land, but merely on the goods and chattels of the tenant. (See 1 Cruise's Dig. 323; 2 Watk. 127; Scriven, 422; and Fish. on Cop. 71). Heriots are not peculiar to copyhold estates. They are sometimes found attached to freehold estates, which are held by service and suit of court; such freeholds being commonly called "suit-hold estates," and are for the most part enfranchised copyholds, the heriot being still due by custom. The law relative to this subject will, therefore, be more properly clased under tit. *Heriot.*

heriotable copyhold tenements; then the case sets out the pedigree of Samuel Warren. It appears that he died seised of these two tenements; that he had four daughters, Catherine, Eleanor, Mary, and Ann; that Catherine, his eldest daughter, had a daughter named Kitty. It appears by the pedigree, that with respect to the sisters, all of them died without issue, except Catherine, and that these sisters each took a fourth of the copyhold premises. It appears by the case, that these fourths descended to the four children of Catherine, the eldest daughter; and of the four children, two died without issue. The whole of the property is now vested in Sir Charles Bunbury. The question for the opinion of the Court was, whether the plaintiff, as lord of the manor, was, upon the death of the said Sir Charles Bunbury, entitled to more than two heriots, and if to more than two, to how *many* heriots, in respect of the several copyhold premises, whereof the said Sir Charles Bunbury so died seised. If *Attree* v. *Scott* (6 East, Rep. 476) be good law, it is quite clear that the lord of the manor, on the death of Sir Charles Bunbury, would be entitled at least to four heriots; but if it is not good law—and it is the opinion of the Court it is not—then, on the re-union of the estate, only two heriots are due.

Per Cur.—We are of opinion, that only two are due; for, though during the period that these estates were held by different persons, different heriots were payable by each, yet, when they are united, only one heriot for each estate is payable.

CROOME *v.* GUISE, M. T. 1837. C. P. 4 *Bing. N. S.* 148.

Under a custom, that, if a heriot be not given, 40*s.* shall be paid in lieu thereof, the lord can only claim the fine.

BY a custom as to lands, whereon at the death of the tenant the best beast, &c., was due for a heriot, it was also found, that if the tenant let his land, and at his decease the heriot was not answered, the person to whom the land ought to come should pay 40*s.*, instead of a heriot.

The Court held, that the lord in such case was entitled only to the pecuniary payment in lieu of the heriot.

---

2. *As to his Privileges* and Disabilities.*

REX *v.* SOUTHWOOD, H. T. 1830. K. B. 5 *M. & R.* 414.

A copyholder cannot make a partition without the consent of the lord.

A. AND B., joint-tenants of a copyhold, made a partition by parol, without the assent of the lord, and afterwards occupied in severalty, and A. surrendered to C. by general words.

The Court held, that copyholders cannot make partition without the license of the lord, and even if copyholders could make a valid partition, to endure whilst the existing grant continued, it would be unreasonable to require the lord to make re-grants in severalty, as the lord would thereby lessen his remedy for his rent. At present

* The tenant, who acquires an indefeasible estate in the premises, is no longer, as in former times, a martyr to the military sway and despotic caprice of the lord of the manor. (*Rex* v. *Lucas*, T. T. 1808, K. B., 10 East, 235). A copyhold qualifies a copyholder to inspect the court rolls, (*Bateman* v. *Phillips*, M. T. 1811, C. P., 4 Taunt. 162), although no suit be pending at the time. (*Rex* v. *Tower*, E. T. 1815, K. B., 4 M. & S. 162).

every part of the copyhold is liable for the whole rent; whereas, after a severance assented to by the lord, he could distrain only pro particulâ illâ.

DEARDEN *v.* EVANS, E. T. 1839. Ex. 5 *M. & W.* 11.

So, a copyholder has no right to convert to his own use large stones which have fallen from the adjoining cliff, and embedded in the land at the time of his admission.

THIS was an action of trover, brought by the plaintiff as lord of the manor, to recover the value of some cobstones, carried away by the defendant. It appeared that the plaintiff became lord of the manor a few years back, and that the defendant was admitted to his copyhold in the year 1826. The cobstones, which were the subject of the action, were pieces of rock, in very great quantities, and of various sizes and weights, some being the size of a man's fist, while others weighed three tons, which appeared to have fallen from time to time from some high rocks called the Redis-shore Scouts, upon the locus in quo, which was called the Steanor Bottom Wood, and which was part of the copyhold of the defendant, and within the plaintiff's manor. The plaintiff was only the lord of the manor, and was not the owner of the rocks called the Redis-shore Scouts. The part of the Steanor Bottom Wood, not covered by the cobstones, was used as pasture land by the defendant. There was no evidence to shew when any particular fragments of the rock had come down upon the land, some having been there beyond all memory; but there was proof, that, about thirty years ago, there had been a great fall of cobstones upon this field, when many score of tons came down. It appeared, that these stones were not embedded in the soil, or affixed to it in any way beyond what their own weight in falling had occasioned, and that great quantities were lying quite loosely upon the surface, while some were considerably embedded, but none wholly covered. *Alderson*, B., left it to the jury to consider, whether these stones had not fallen some time or other from the cliffs above upon the defendant's land, though there was no evidence to shew when any particular portion had fallen, and they found their verdict in those terms; upon which his lordship directed a verdict to be entered for the plaintiff, with nominal damages. On motion to set the verdict aside—

Per Cur.—We think that there was no misdirection, and that the verdict was right. If it were necessary to decide whether, under certain circumstances, a copyholder might not remove stones that incumbered his land for the benefit of agriculture, we are not at all prepared to say that he might not, as probably a tenant for life or years, or one having a smaller estate, might do, where the stones had been deposited on the land by accident, or by a convulsion of nature. But that is not the question here; the question is, whether the copyholder may treat these stones, which are embedded in the soil, and may have been there, for aught that appears, since the deluge, as incumbrances. In such a case, we think the lord may enter and take them. These do not appear to have been moved for the benefit, but to the detriment of the estate, and the copyholder has converted them to his own profit. They form part of the soil, and a part of the value of the soil, and could not be removed in this way.

VIII. RELATIVE TO THE REMEDIES THE LORD AND TENANT HAVE TO PROTECT THEIR RESPECTIVE RIGHTS.

(*a*) By action.

1. *By whom maintainable.*

LEWIS *v.* BRANTHWAITE, E. T. 1831. K. B. 2 *B. & Ad.* 437.

There is the same right to maintain an action by a copyholder as a freeholder.

IN trespass, it appeared that the plaintiff was a copyhold tenant of the manor of Abercarne, in the county of Monmouth, of, among other lands, the close in question; and the defendant, who was in possession of a colliery lying under land adjoining that of the plaintiff, opened a level under the plaintiff's close, for the purpose of taking out coal. There was no evidence that the defendant had ever trespassed on the surface; and it was, therefore, argued by the counsel for the defendant, that an action for a trespass to the subsoil could not be maintained by the plaintiff, he being a copyhold tenant, and in possession of the surface only, the mines and trees being the property of the lord. The jury were directed by *Bolland*, B., to find a verdict for the plaintiff. On motion for a nonsuit—

Per Cur.—It is not denied that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth; but it is said, that there is a distinction in this respect between a copyholder, who is the tenant at will of the lord, and a tenant of a freeholder, that, as the absolute property in the freehold is in the lord, the property in the mine must be in him; and that, as the plaintiff could not make any use of these minerals, he cannot maintain an action against a wrong-doer for committing a trespass in the soil below the surface. But if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the sub-soil belonged to him. We are of opinion, that, although the property in the mine may be in the lord, he has not such a possessory right in it as to entitle him to maintain trespass against a wrong-doer; and that the copyhold tenant has such a possessory right, and may recover substantial damages for any actual injury done to the surface, and nominal for a trespass committed below the surface.

DOE *v.* CRISP, M. T. 1838. Q. B. 1 *P. & D.* 37.

The heir of the devisor may maintain ejectment without admittance.

IN ejectment for copyhold premises, a verdict was found for the lessors of the plaintiff, subject to the opinion of the Court on a case which set forth a will by which a testator devised certain copyhold estates to his daughter in law for life, with remainder to his heir, subject to a certain condition to be performed within three months after the testator's death. It did not find that the heir had notice of the condition; but it stated that the tenant for life, who was the mother of the heir, entered into possession, and the heir was never admitted to the lands, and his heir suffered the parties taking in remainder, upon breach of the condition, to enter and be admitted, and remain in possession undisturbed for several years.

Per Cur.—Although the Court may, in a special case, infer a fact

which they cannot do in a special verdict, there are no sufficient circumstances from which the inference can be drawn in this case, that notice had been given. On the ground, therefore, of the want of notice, it is clear that the heirs at law though not admitted are entitled to recover.

---

2. As to the Court where they are to sue.*

3. As to the Form of Action.

LORD VERULAM *v.* HOWARD, M. T. 1830. C. P. 7 *Bing.* 327; S. C. 5 *M. & P.* 148.

In assumpsit for a copyhold fine†, the real value is the test and not the rent reserved.

IN assumpsit for a copyhold fine—

The Court held, that the defendant was not estopped by the rent reserved by him on the premises from shewing the real value.

---

4. As to the Pleadings.

DOE *d.* SWEETING *v.* HELLARD, T. T. 1829. K. B. 9 *B. & C.* 789.

The statute of limitations runs from the right of entry.

AN ancient tenement was granted to C., D. and E. for the lives of C., D. and E., the life of E. having been put in by A., who paid part of the fine; and during the life of C., upon an enclosure of certain lands upon which the copyholders of the manor had rights, a claim was made by D. in respect of such ancient tenement, though not in possession; and an allotment was made to him and the lords according to their respective rights and interest for and in respect of such ancient tenement, and he continued in possession thereof from the period of the award until his death; and no claim was made before the commission by C., the tenant in possession, nor any demand or acknowledgment made of D. in respect of the allotments.

The Court held, that upon the death of C. and D. the third nominee was not bound by the statute of limitations, having no right of entry until the death of D., nor yet by the clause of the inclosure act, whereby the award of the commission was declared to be final; the claim made by D. being to be considered as made on behalf of all the parties interested in the principal tenements.

---

5. As to the Evidence.

DOE *d.* HAWTHORN *v.* MEE, E. T. 1833. K. B. 1 *N. & M.* 424.

The title of a copyholder is established by

IN ejectment, for the purpose of making out the title of Hawthorn, a stamped copy of a surrender of the premises from the father of

* It is not imperative on the litigant parties to submit to the customary court where justice cannot be obtained; as, for instance, where disputes arise between lord and tenant, it must of necessity be referred to the courts above, as the lord must not be both party and judge.

† So, an action of debt may be resorted to. (*Yaxle* v. *Rainer*, 1694, K. B. 1 Ld. Raym. 44; contra, *Cudmore* v. *Honywood*, M. T. 1090; Carth. 183). And of course his executors as his representatives may equally recover. (*Shuttleworth* v. *Garnett*, T. T. 1688, K. B., 3 Lev. 261; S. C. Carth. 90; S. C. 1 Show. 35; S. C. 3 Mod. 239).

producing stamped copies of the surrender and admission*.

the defendant to Hawthorn as mortgagee, and a stamped copy of an admission of the latter, were produced in evidence. It was objected on the part of the defendant, that the stamped copy of the surrender, which had been made out of court, ought not to be received in evidence, but that the lessor of the plaintiff was bound to produce the original deed of surrender properly stamped. Lord *Denman*, C. J., directed the jury to find a verdict for the lessor of the plaintiff.

Per Cur.—The Stamp Act †, (48 Geo. 3, c. 149), has required, that in one case the deed of surrender shall be stamped, in another that the stamp shall be upon the copy of the court-roll; but this was a mere matter of convenient arrangement, the legislature thinking that the payment of the revenue would by this means be most effectually secured. This was not intended to alter the rules of evidence, and we cannot depart from those rules, because, by adhering to them in a particular case, there is a possibility that the revenue may be injured. This case falls within the general rule that examined copies of the rolls of a court are evidence.

DEAN OF ELY, &c. *v.* CALDECOTT, E. T. 1831. C. P. *7 Bing.* 433; S. C. 5 *M. & P.* 272.

But the book of fines kept by the steward is not evidence‡.

THE plaintiffs tendered in evidence a book in the possession of the steward of the manor, which had devolved to him from his predecessors in office, was kept with other muniments of the manor, and was accessible to the copyholders, containing entries of all fines assessed, whether paid or not. It appeared that another book was made up at the end of each year, containing entries by the steward of all fines actually paid. *Alderson*, B., rejected the first-mentioned book. On motion for a new trial—

Per Cur.—We are of opinion that the learned Judge properly rejected the book. It consisted of entries of fines assessed, not only of those which were eventually paid, but of those that were not paid; and it was offered as evidence to prove the payment of fines in such cases as that in question. How could it prove that? It would be dangerous to admit such a book; for if it were held to be admissible it would be practicable by a series of entries, unassented

* A copy of court-roll admitting a surrenderee in trust for the grantee of an annuity, there stated to be secured by the bond of the purchaser, and subject thereto, to the use of the purchaser, his executors, administrators, and assigns, requires an ad valorem stamp in respect of the purchase-money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity, whether the statement is taken to refer to an annuity already granted, or to an annuity to be created in futuro. (*Doe* d. *Chapeau* v. *Reynolds*, 2 Nev. & M. 383).

† Now the 55 Geo. 3, c. 184.

‡ The record book of admittance is evidence of a surrender where the original surrender has been lost. (*Rex* v. *Thruscross*, E. T. 1834, K. B., 3 N. & M. 284; S. C. 1 A. & E. 126; abridged post, tit. *Settlement*). Where the surrender of a copyhold was by a power of attorney, held, that the court-roll, stating it to be by power of attorney, was secondary evidence of the power of attorney, if it could not be found. (*Doe* v. *Caperton*, 1839, N. P., 9 C. & P. 113). If the evidence proves a custom to bar estates tail in copyhold lands by recovery *and* surrender, the question for the jury must not be in the alternative. (*Doe* d. *Walhead* v. *Ossingbrooke*, 9 Moore, 68). In ejectment for copyholds, the court-rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his inheritance, are evidence of his title against the alleged surrenderor. (*Doe* d. *Garrod* v. *Olley*, 4 P. & D. 275).

to by payment, to increase the extent of liability of the tenants. It cannot be said that the book contained evidence of the steward's charging himself, for it seems he annually made up another book which contained the fines actually paid.

---

6. *As to the Witnesses.*

LADY LE FLEMING *v.* SIMPSON, E. T. 1828. K. B. 2 *M. & Ry.* 169.

A copyholder is ineligible to prove a customary right to take timber for repairs.

To establish a customary right in the manor for the customary tenants to take timber for repairs without the assignment of the lord, the defendant's counsel proposed to call customary tenants of the same manor to support the alleged right. But it being objected that the witnesses tendered were incompetent on the score of interest, their evidence was rejected and a verdict was found for the plaintiff, and the Court refused to interfere.

(*b*) BY DISTRESS*.

(*c*) BY CUSTOMARY PLAINTS†.

(*d*) BY A WRIT OF MANDAMUS‡.

* The lord may distrain upon his copyhold tenant for non-performance of suit; (Co. Litt. ss. 225, 226, 227; Gilb. Dis. 5; 2 Watk. 177; 2 Inst. 118; Noy, 135; S. C. 2 Brownl. 279); but the distress is considered as a pledge to compel the performance of the services and cannot be sold. (Yelv. 194; Cro. Jac. 256; 1 Bulst. 52; Gilb. Dis. 13). The lord may distrain for rents of assize of common right; (Co. Litt. s. 213; Gilb. Dis. 5); and now by the 4 Geo. 2, c. 28, s. 5, all persons have the like remedy by distress for rents of assize, chief rents, and rents-seck, (Gilb. Dis. 6), as in the case of rents reserved upon lease; and the statute extends to copyholds. (Ib.; Gilb. Ten. 150; 2 Watk. 181).

† A copyholder in every action real, may plead and be impleaded in respect of his copyhold land, in the court of the manor of which it is holden; and therefore, in case of ouster by a stranger, he cannot implead him by the king's writ but only by plaint in the lord's court, with protestation to prosecute his suit in the nature of a writ of entry, or of assize of novel disseisin, or of mort d'ancestor, or in the nature of the grand writ of right, the process upon plaints for copyhold lands being analogous to the common-law writs in real actions. And this rule equally applies to copyhold lands held of a manor of ancient demesne. (Co. Cop. s. 57, tr. 118; see 1 Scriven, 541).

‡ As both the surrenderor and surrenderee are without remedy by action at law against the lord of the manor for refusing admittance, a mandamus will be granted. (*Rex* v. *The Lord of the Manor of Hendon*, E. T. 1788, K. B., 2 T. R. 484; S. P. *Rex* v. *The Borough of Midhurst*, M. T. 1750, K. B., 1 Wils. 283; S. P. *Roe* d. *Noden* v. *Griffiths*, M. T. 1766, K. B., 4 Burr. 1953; S. P. *Rex* v. *Coggan*, 6 East, 431; S. C. 2 Smith's Rep. 417). The lord and steward are also compellable by mandamus to permit the court-rolls to be inspected by any person claiming an interest under them. (*Rex* v. *Lucas*, T. T. 1808, K. B., 10 East, 235; S. P. *Bateman* v. *Phillips*, 4 Taunt. 162; S. P. *Rex* v. *Tower*, 4 M. & S. 162). So, should the lord or his steward refuse to receive and inrol a surrender, it may be enforced by a mandamus. (*Rex* v. *Rigge*, E. T. 1819, K. B., 2 B. & A. 550).

Copyright *.

See, also, tit. *Author*.

BRITISH MUSEUM *v.* PAYNE, H. T. 1828, *in error*. 4 *Bing.* 549; S. C. 2 *Y. & J.* 166; S. C. 1 *M. & P.* 415.

Where the copyright of a valuable work was bequeathed to trustees, limiting the numbers to thirty-six copies:—Held, that such numbers were not within the 54 Geo. 4, c. 156.

ON a writ of error, it appeared that the late Dr. Sibthorpe having, in his lifetime, prepared the principal materials for the work in question, by his will directed that the work should be published; and devised to his executors certain funds for the purpose of defraying the expenses of publication. After the death of Dr. Sibthorpe, the intention of the testator was carried into effect by the publication of the work in parts, thirty copies being printed, for which there were twenty-six subscribers only, at 12*l.* 12*s.* each part. The amount of this subscription was inadequate to pay the expenses of publication, and the deficiency was defrayed by the executors out of the funds devised by the testator for that purpose. Three numbers were published before the passing of the 54 Geo. 3, c. 156, since which time six numbers had been published by the defendants. The numbers were not published at stated periods, but at intervals of several years, as the funds devised by the testator were sufficient for that purpose. It was proved that some of the numbers beyond those subscribed for had been sold. The action was brought in respect of No. 9, being the first part of the 5th volume. *Bayley*, J., told the jury that the defendants were the publishers within the meaning of the act of Parliament; but that the part in question, No. 9, was not a book demandable under the act, upon which direction the jury found a verdict for the defendants.

Per Cur.—We are of opinion, with the judge who tried the cause, that the persons for whose benefit this provision was intended, have

* As to printed books and publications, see 8 Anne, c. 15; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156; 6 & 7 Will. 4, c. 110.

As to engravings, see 17 Geo. 3, c. 17.

As to lectures, see 5 & 6 Will. 4, c. 65.

As to designing and printing linens, cottons, calicoes, and muslins, see 27 Geo. 3, c. 38; 34 Geo. 3, c. 23; 2 Vict. c. 15; 2 Vict. c. 17.

As to models of casts and busts, see 38 Geo. 3, c. 71; 5 Geo. 3, c. 56.

As to international copyright, see 1 & 2 Vict. c. 59.

A narrative of a voyage of discovery, prepared under the orders of the Crown, is the property of the Crown; but the publisher under the order of the Board of Admiralty, who had the disposition of the profits, having no personal title:—Held not entitled to an injunction to restrain a stranger from publishing. (*Nicol* v. *Stockdale*, 3 Swanst., Ch., 687).

The difficulty of separating the pirated matter from what is original, however valuable the latter, is no ground for the court refusing its protection to the former; nor, on an application for the purpose of such protection, will the Court necessarily call on the plaintiffs for any explanation of their title, nor the mode of acquiring it: but semble, where the pirated matter is small in comparison with the whole work, the Court will leave the complaining party to his action at law; and it will not grant an injunction against the entire work, until, by inspection or otherwise, it has ascertained the quantity of matter pirated; and in difficult cases, as in cases of Encyclopædias, will refer it to the Master to ascertain the extent of it. (*Mawman* v. *Tegg*, 2 Russ., Ch., 385.

no right, by force of a provision so expressed, to demand from the publishers that which is neither a book nor a volume, but only a part of a volume. We are of opinion, that we are to understand the legislature as having in this clause employed the words in their common and accepted sense, and that we have no right, by a questionable subtlety, to extend the construction of the words beyond their usual and natural import.

MURRAY *v.* HEATH, H. T. 1831. K. B. 1 *B. & Ad.* 804.

The 17 Geo. 3, c. 57, and preceding statutes, only apply to engravings printed from other engravings, and not from the original plate.

THE declaration stated, that the plaintiff was possessed of, and had right to, the sole use of divers drawings, his property; that he delivered them into the custody of the defendant Heath, to be by him engraved on copper-plates for the plaintiff's sole use, for reward from the plaintiff to Heath, and to be returned with such copper plates so engraved; and that he retained Heath in that behalf, and Heath accepted the drawings, and took the same for the purpose aforesaid, and under the said retainer engraved the same on copper-plates for the plaintiff; and the plaintiff paid him the said reward; and charged that the then defendants, whilst the said drawings and copper-plates remained in Heath's custody, worked and took off for their use divers impressions on paper from the said plates, without the plaintiff's consent.

Per Cur.—There might be some difficulty, if the case were to be considered upon the terms of the 17 Geo. 3 alone. But the preamble to that act recites the previous acts of the 8 Geo. 2, c. 13, and the 1 Geo. 3, c. 38; and from these it is quite clear, that the mischief against which the legislature meant to provide was the making engravings from new plates or designs. For any such act the party injured has his remedy by action on the case; and is entitled under the statute to double costs. Looking at the 8 Geo. 2, the recital and the different provisions, this is perfectly clear. The present case was never thought of; and no act of Parliament was necessary to provide a remedy; for the act done by the defendant Heath was a fraud at common law. The plaintiff is therefore, at common law, entitled to recover against Heath.

NEWTON *v.* COWIE, E. T. 1827. C. P. 4 *Bing.* 234; S. C. 12 *Moore*, 457.

Engravings must contain the date of publication and name of publisher to sustain an action for piracy.

THIS was an action on the case against the defendant for pirating certain engravings published by the plaintiff, in a work called "The London Journal of Arts and Sciences." It was contended on the part of the defendant, that the plaintiff could not recover, inasmuch as he had not, in compliance with the conditions of the acts of Parliament, engraved on each of the plates the name and the date of the publication; the prints mentioned in the first and ninth counts were dated, and the name of the plaintiff as the delineator was inserted; but those in the second and seventh counts were not dated; and also that the drawings, being merely copies, on a reduced scale, of drawings inrolled at the patent office, the plaintiff could have no copyright in them. The jury, however, under the direction of the learned Judge, found for the plaintiff on four of the counts of the

declaration, with one shilling damages on each, the rest having been abandoned. Leave was given to move to enter a nonsuit.

Per Cur.—The objection to the verdict on the first and ninth counts is, that the prints do not appear to bear the name of the proprietor. The words on it are, "Newton del. 1st May, 1826. Gladwin sculp." The stat. 8 Geo. 2, c. 13, which gives a monopoly to the proprietors of prints, prescribes, that the day of the first publication shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints. It is not usual, nor do we think it necessary, that it should be stated on the print, in terms, that a particular person is the proprietor. In the case of *Blackwell* v. *Harper*, (2 Atk. 93), decided after the passing of the act, the names of the designer and engraver alone appeared on the print, as in this instance. Such has been the uniform practice of engravers, and a decision questioning its propriety would have the effect of destroying much valuable property. The same objection was made in *Blackwell* v. *Harper*; but Lord *Hardwicke* treated it as of no importance. The objection to the second and seventh counts is of more consideration: it is, that the prints in those counts mentioned *bear no* date. There have been many cases on this point, but they are conflicting; and the reasoning in them on both sides of the question is so very unsatisfactory, that having no power to measure the exact degree of respect that is to be paid to the opinions of each respective judge who decided them, we must recur to the statutes themselves. On looking through these, it is impossible not to see that it was the intention of the legislature, that the public should be protected against a fraudulent continuance of the monopoly beyond the prescribed term, which might be the case if the date had not been required to appear on the face of the prints.

SWEET *v.* ARCHBOLD, T. T. 1833. C. P. 10 *Bing.* 133; S. C. 3 *M. & Scott*, 299.

A party who has brought an action for piracy, and the action settled, cannot join a co-proprietor in another action for the same offence.

A. AGREES with B. and C. to write a work upon the practice of the Court of King's Bench. Having completed his contract, he undertakes to write a similar work upon the practice of the Common Pleas; of this work he executes a portion, which he places in the hands of those with whom he formed the contract. Of the portion thus completed many pages were copied verbatim from the work on "the practice of the King's Bench." Upon action against the party for not completing the second work, he gave a cognovit, by which he agreed to pay certain damages for his default; and, by a condition in the cognovit, the portion of the second work which was completed, and of which many pages were mere transcripts of the first work, was returned to him, and which he afterwards published on his own account. Upon an action against him for piracy by two persons, one of whom a plaintiff in the former action—

The Court, held that such cognovit was a good defence, both against the plaintiff in the former action and his co-plaintiff in this.

CUMBERLAND *v.* PLANCHE, T. T. 1834. K. B. 3 *N. & M.* 537; S. C. 1 *Ad. & E.* 580.

The assignee and not the

THE plaintiff was a bookseller and publisher in London. The defendant was the author of a farce called "The Green-eyed Mon-

author of a dramatic work under the 4 & 5 Will. 4, c. 15, is entitled to the copyright.

ster," composed, printed, and published within ten years before the passing of 3 Will. 4, c. 15. On the 1st November, 1825, the defendant, by an instrument under seal, assigned to the plaintiff for a valuable consideration all his right, title, and interest whatsoever in the copyright of the said farce, to have and to hold to the said plaintiff as his absolute property. Previous to the assignment of the copyright of the farce in question to the plaintiff, the defendant duly granted to the proprietors of the Haymarket Theatre for a valuable consideration the right of representing the said farce at that theatre, and the same had been frequently represented and performed there, a manuscript copy of the said farce having been delivered by the said defendant to the said proprietors for that purpose, which circumstances were known to the plaintiff before he contracted with the defendant for the purchase of the copyright; but the defendant, after granting the right of representation at the Haymarket Theatre, still possessed the right of representing, or authorizing the representation, of the farce at any other theatre at his pleasure. After the passing of the above act, and within twelve months before the commencement of the suit, the defendant claiming to be the person entitled by virtue of the provisions thereof, without the consent of the plaintiff, caused the farce to be represented for profit at a place of dramatic entertainment in England other than the Haymarket Theatre. It was admitted on the part of the plaintiff, that, previous to the passing of the above act, printed dramatic copyright pieces were constantly represented at different theatres without the consent of any person; and that the consent of the assignee of the copyright of such dramatic pieces to the representation was not necessary, and was not given or required: and that pieces performed and not printed were sometimes surreptitiously obtained for the purpose of representation at theatres, and represented without consent in the country, but not in London or within ten miles thereof. The question for the opinion of the Court was, whether the plaintiff by virtue of the said assignment was the assignee of the author within the meaning of the act, and entitled to the liberty of representing the said farce at places of dramatic entertainment, subject to the right or authority of the proprietors of the Haymarket Theatre. If he was such assignee verdict to be for the plaintiff, damages 1*s.*

The Court held, that the plaintiff was "the assignee of the author" within the meaning of the act, and that he alone had the right subsequently of causing it to be represented at a place of public entertainment for profit, and that the defendant himself had no right.

PLANCHE *v.* BRAHAM, M. T. 1837. C. P. 4 *Bing. N. S.* 17; S. C. 4 *Scott*, 242; S. C. 8 *C. & P.* 68.

In debt for penalties under the 3 & 4 Will. 4, c. 16*, the

IN an action on the 3 & 4 Will. 4, c. 15, for singing some songs from an opera written by the plaintiff. It appeared that the plaintiff in the year 1826 had written an opera called "Oberon," founded on a German poem of that name, of which Wieland was the author.

* Sect. 2 enacts, "That if any person shall, during the continuance of such sole liberty as aforesaid, (the liberty conferred by the first section to the author or his assignee), contrary to the intent of this act, or right of the author or his

The music was composed by the celebrated C. M. Von Weber, and the opera was performed with great success at Covent Garden Theatre. The defendant played a principal part, and when he afterwards became the proprietor of the St. James's Theatre he procured and produced another paraphrase of the same poem, called the "Enchanted Horn," and in which were sung the verses of three songs, viz. two scenes and a quartette from the plaintiff's opera, the defendant himself singing one of the scenes and joining in the quartette.

jury may find that the defendant had represented in a dramatic performance part of the plaintiff's copyright.

Tindal, C. J., told the jury, that in his opinion the singing of a song might be a representation within the meaning of the statute; and that the question was, whether the songs sung by the defendant and others were within the act of Parliament a representation, within the meaning of the statute, of "any part" of the production of the plaintiff. The jury found a verdict for the plaintiff for 40*s*. On motion for a new trial the Court refused to interfere, and—

Per Tindal, C. J.—This question is, as it appears to me, under all circumstances, one which must of necessity be decided by the jury who try the cause. This position is, I think, supported by the words of the statute under which the action is brought, and which refers to the dramatic performance of such production, "or any part thereof." These words, in my opinion, render it impossible for the Court to lay down any precise or definite rule as to what portion of composition should be represented to make the party liable to the provisions of the statute; of which it might be said, "patitur aut majus aut minus." This question of a little more or a little less was for the jury to determine, and the decision was left to them; I admit not pointedly, but in effect and substance; for I told them that, if they believed the evidence, part of the drama was in my opinion performed. The statute also, I think, shews that damages are not the test by which the intention of the statute is to be tried, but its object was the prohibition of the performance altogether. This, in my opinion, appears from the fact of its giving 40*s*., though no actual damage has accrued to the party. Those damages the jury have found; and we should be militating against our practice if we were to grant the rule.

BROOKES *v.* COCK, E. T. 1835. K. B. 4 *N. & M.* 652; S. C. 3 *A. & E.* 138.

THIS was an action brought against the defendant for infringing a copyright of certain prints, protected by 17 Geo. 3, c. 57. The declaration alleged that, by virtue of that act, the plaintiff was en-

The defendant may plead that the plaintiff was

assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, or any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount of not less than 40*s*., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented, contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit," &c.

not entitled to the sole right, &c., because the date was not marked on the engraving;

titled to the sole right and liberty of printing, &c., certain prints. The plea alleged that the plaintiff had not the sole right and liberty of printing the prints in question, by reason that no date was marked or printed on the print, according to the form and effect of the statute. Special demurrer, assigning for cause that the issue tendered by the defendant in his plea was an immaterial issue. It was, in support of the demurrer, contended that the statute vested in the proprietors of an engraving the sole right and liberty of printing it for twenty-eight years; that *that* part of the statute which said that the first day of publishing should be truly engraved with the name of the proprietor on each plate, and printed on every print, was directory only; and the omission to do that would not divest the right to maintain the action out of the plaintiff. Unless the Court hold the printing the name and date a condition precedent to the vesting of the right, it is impossible that it can be said that the plaintiff cannot support his action. The clause which imposes the penalty on a printseller printing, &c., does not contain this qualifying enactment.

Sed per Cur.—Here the defendant would not be liable to a penalty. There is no mode of enforcing it. No doubt can be entertained but that these words are not merely directory, but descriptive of the prints entitled to the protection of the act; but it is unnecessary to say more than that this case is already decided in *Newton* v. *Cowie*, (4 Bing. 234; ante, p. 142). We think the plea good.

BARNETT *v.* GLOSSOP, E. T. 1835. C. P. 1 *Bing. N. S.* 633; S. C. 1 *Scott*, 621.

but under the plea of non assumpsit, the defendant cannot shew that the assignment was not in writing.

ASSUMPSIT to recover the sum of 20*l.*, money agreed to be paid by the defendant to the plaintiff for a certain dramatic piece, written and composed by the plaintiff, and the sole right of acting, performing, and representing the same, bargained and sold by the plaintiff to the defendant, at his request. There was also a count upon an account stated. Plea, non assumpsit and issue thereon. The cause was tried before the Secondary; and it was objected for the defendant that the plaintiff could not recover, as the assignment of the work in question was not in conformity with the statutes 8 Anne, c. 19, and 3 & 4 Will. 4, c. 15, which required that such assignments should be in writing. The Secondary, however, was of opinion that such defence could not be given under the plea of non assumpsit, but that the defendant was bound to plead it. A verdict having passed for the plaintiff—

The Court held that the defendant cannot, since the new rules, give in evidence that the assignment of the property for which the action was brought was not in conformity with the statutes 8 Anne, c. 19, and 3 & 4 Will. 4, c. 15. Such defence should be put upon the record.

Corn Returns*.

See also 5 & 6 Vict.

REX *v.* TOWNROW, M. T. 1830. K. B. 1 *B. & Ad.* 465.

The return made by the corn inspector applies to all sales, whether the sale be binding or not.

THE defendant had been convicted by the magistrates of the borough of Newark, under the 9 Geo. 4, c. 60, ss. 27, 42, in the mitigated penalty of 10*l.*, for that he, being a corn-factor, (and described in other respects as a person coming within those sections), had not returned to the corn-return inspector for Newark an account of a parcel of corn bought by him during the week ending on the day next preceding the first market-day after the purchase. The conviction, as returned to the court by certiorari, set out the information, evidence, and adjudication at length; but it is not necessary, for the purpose of this case, that either should be so given here. The case turned upon the following point:—the buying of the corn, which was the subject of inquiry, was a buying by parol. There was no note in writing, nor any other circumstance to take the contract out of the operation of the Statute of Frauds; every other such circumstance being negatived upon the evidence. It might therefore be conceded to the defendant, (and indeed was conceded in the agreement), that the "buying," for the not returning which the defendant was convicted, was a buying under a contract which could not have been enforced at law. In point of fact, the contract had afterwards been executed; but no reliance was placed upon this circumstance by the counsel in support of the conviction.

Per Cur.—The question is, whether the "bought" and "sold," as used in this act, are used with reference only to such contracts as can be enforced in a court of law, by reason of the provision of the Statute of Frauds being complied with; or, are used with reference to contracts actually made, whether they could be enforced at law or not. To decide this question, we must look at the object of the act. It is to obtain an account of all sales of corn made during the preceding week, in order to obtain the average price for the week. It is also desired to obtain the average price of every six weeks. It is clear that the object was to obtain an account of the sales made within the week, whether they had been carried into effect by delivery or not. To give effect to the intention of the legislature, we must understand the words "bought" "and "sold" to have been used according to their ordinary meaning. If it was intended to confine the meaning to "buying" and "selling," which should be accompanied by the requisites provided for by the Statute

* The forfeiture for buying corn by any other than the Winchester measure is 40*s.*, besides the value; and a conviction for buying a certain quantity of wheat, to wit, fifteen bushels, is sufficiently certain. (*Rex* v. *Arnold*, T. T. 1793, K. B., Nol. Rep. 282; S. C. 5 T. R. 353; S. P. *Rex* v. *Major*, T. T. 1792, K. B., 4 T. R. 750). Under the 31 Geo. 3, c. 30, if one bushel of corn were shipped in time to get the bounty, with intention to ship the rest afterwards, the whole quantity put on board was entitled to the bounty. (*Wilson* v. *Sutton*, E. T. 1793, Ex., 2 Anst. 444). But under the 44 Geo. 3, c. 10, no bounty was due on the exportation of foreign corn, unless an average price was published as provided by the act. (*Sorsbie* v. *Munro*, T. T. 1805, K. B., 2 Smith, 565). Malt is deemed corn. (*Anon.*, M. T. 1771, K. B., Lofft, 72; S. P. *Moody* v. *Surridge*, H. T. 1796, K. B., 2 Esp. 633).

of Frauds, we think that words would have been used so to confine the meaning. The preventing of fictitious sales was a secondary object; and indeed fictitious sales would be no sales at all, within the meaning of the act; although it has been thought advisable to make it a misdemeanor to return pretended sales. The main object was to learn the price which the article bore during the week. As to the argument which has been addressed to us, that this is a penal act of Parliament, and therefore should be construed very strictly, we must answer that it is an act passed to effect a very important public object, and ought to be obeyed; obedience to it causes no inconvenience, and no good reason can be assigned to justify a disobedience. We are therefore of opinion that this conviction is right.

Cornwall, Duchy of.

See tit. *Copyhold.*

ROWE *v.* BRENTON, M. T. 1828. K. B. 8 *B. & C.* 743.

A caption of seisin, taken to the use of the first Duke of Cornwall, by persons appointed by letters patent for that purpose, being a public act, is evidence as to the rights of the duchy.

IN this case, which related to the right of certain mines in Cornwall, a document was produced from the King's Remembrancer's Office, purporting to be a caption of seisin, "to the use of the Duke of Cornwall, by James de Woodestocke, and William de Monden, assigned by the letters patent of the Duke to do the same, on Monday, May 12, 11 Ed. 3." For the plaintiff it was objected, that this instrument could not be read in evidence. That it was not a public document, executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall. The Duke of Cornwall was merely a subject, although the highest in the kingdom; the public had no interest in his acts, nor any with respect to the revenues of the dukedom. His acts were, therefore, to be treated as those of any other subject; and consequently, this instrument could not be used for the purpose of affecting the rights of third persons. It was introduced, not merely to prove the fact of seisin having been taken, but to prove circumstances relating to the manors comprised in the grant from the Crown. For the defendant it was urged, that this was a public document, relating to the property of the Crown, inasmuch as it was the evidence of what had been alienated by Edward III. to the Duke of Cornwall.

Per Cur.—It has been argued that this instrument cannot be received in evidence, because it is a mere private document; the acts of the Duke of Cornwall being only like those of any other subject. In general that is true; but with regard to the duchy of Cornwall, the possessions granted to him revert to the Crown. The Crown representing the public, has an interest in every thing relating to the duchy of Cornwall and its revenues; and it is immaterial whether any act affecting them is done by the King when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is therefore a document affecting the interests of the public, and must be received.

Coroner.

(6 *Peters. Abr.* 579).

See tits. *Deodand—Mandamus.*

I. RELATIVE TO THE DIFFERENT KINDS OF CORONERS.

(*a*) Of the county, p. 150.

(*b*) Of the verge, p. 151.

(*c*) Of the admiralty, p. 151.

(*d*) In boroughs, p. 151.

II. RELATIVE TO THE QUALIFICATIONS OF, p. 151.

III. RELATIVE TO THE APPOINTMENT, ELECTION, SWEARING, AND DURATION OF THE CORONER'S OFFICE.

(*a*) As to the appointment of.

1. *By virtue of Office*, p. 151.

2. *By Charter*, p. 151.

3. *By Election of*, p. 151.

(*b*) As to the swearing of, p. 152.

(*c*) As to the duration of, in office, p. 152.

IV. RELATIVE TO THE DUTY OF THE COUNTY, p. 152.

V. RELATIVE TO THE DUTY AND AUTHORITY OF CORONER.

(*a*) To act within his jurisdiction, p. 152.

(*b*) To take inquests.

1. *In general*, p. 152.

2. *As to the definition of Offences over which he has power.* See tits.

Abortion,
Assault and Battery,
Bastard,
Duelling,
Escape,
Homicide,
Manslaughter,
Murder,
Riot,
Treason,
Unlawful Assembly.

3. *By whom to be taken where there are several Coroners*, p. 152.

4. *Within what Time to be taken*, p. 153.

5. *To summon the Jury*, p. 153.

6. *To view the Body*, p. 153.

V. RELATIVE TO THE DUTY AND AUTHORITY OF CORONER—(*continued*).

7. *To summon and examine Witnesses, and receive Evidence; and of the Witnesses' Expenses*, p. 153.

8. *To adjourn the Inquest*, p. 154.

9. *As to the Form of the Inquisition*, p. 154.

10. *To take Recognisances*, p. 156.

11. *To issue Warrants for Apprehension and to commit to Prison*, p. 156.

12. *To execute Process*, p. 156.

VI. RELATIVE TO THE RIGHTS OF CORONER.

(*a*) To fees, p. 156.

(*b*) To appoint a deputy, p. 157.

VII. RELATIVE TO THE LIABILITIES OF THE CORONER, p. 157.

VIII. RELATIVE TO THE VERDICT, p. 158.

IX. RELATIVE TO THE PUBLICATION OF PROCEEDINGS BEFORE THE CORONER, AND OF A STRANGER'S RIGHT TO ATTEND THE INQUEST, p. 158.

X. RELATIVE TO THE AMENDMENT AND QUASHING INQUISITIONS TAKEN BEFORE A CORONER, AND OF THE REMOVAL OF, p. 160.

XI. RELATIVE TO THE FORFEITURE OCCASIONED BY THE ACCUSED ABSCONDING, AND OF THE DEODAND, p. 160.

XII. RELATIVE TO THE ADMISSIBILITY OF PROCEEDINGS TAKEN BEFORE A CORONER, AND OF THE CORONER BEING A WITNESS, p. 160.

XIII. RELATIVE TO THE PROCEEDINGS ON THE DEATH OF A CORONER, p. 160.

XIV. RELATIVE TO THE EFFECT OF THE INQUEST, p. 160.

I. RELATIVE TO THE DIFFERENT KINDS OF.

(*a*) Of the county*.

* The 3 Edw. 1, c. 10, enacts, "That in all shires a sufficient number of men shall be chosen to act as coroners." No precise number, however, is required. In some counties there are six, in some four, and in others only one or two. (See 2 Inst. 175; F. N. B. 163). In Middlesex there are two; and by the 34 & 35 Hen. 8, c. 26, in each county in Wales and Chester there shall be two. (See also 1 Hale, P. C. 56).

(*b*) Of the verge *.

(*c*) Of the admiralty †.

(*d*) In boroughs ‡.

II. RELATIVE TO THE QUALIFICATIONS OF CORONER §.

III. RELATIVE TO THE APPOINTMENT OF, ELECTION OF, SWEARING OF, AND DURATION OF THE CORONER IN OFFICE.

(*a*) As to the appointment.

1. *By virtue of Office* ||.

2. *By Charter* ¶.

3. *By Election* **.

* By the 3 Hen. 8, c. 12, all inquisitions upon view of persons slain in any places or houses of the king shall be taken by the coroner of the household, without the assistance of the coroner of any shire, by twelve or more of the yeomen officers of the king's household, returned by the two clerks comptrollers, the clerks of the cheque, and clerks marshal, or one of them, on the coroner's precept to them. (See 4 Co. 46 b). But, if the same person be coroner of the verge and also of the county at large, an inquest taken before him shall be good. (See 4 Co. 47 a).

† Coroners of the admiralty are those who take inquests of deaths arising upon the high sea. (See 2 Hale, P. C. 54),

‡ By 5 & 6 Will. 4, c. 76, s. 62, it is enacted, "That in every borough having a separate court of quarter sessions, the council are to appoint a fit person, not being an alderman or councillor, to be coroner of such borough, so long as he shall well behave himself in his office;" and they shall fill up every vacancy within ten days after it occurs.

§ Formerly no person was eligible to the appointment of coroner under the degree of a knight. (See 3 Edw. 1, c. 10; 4 Inst. 271). And by the 14 Edw. 3, c. 8, s. 1, no coroner shall be chosen, unless he has land in fee sufficient to answer to all manner of people, and be of sufficient ability and knowledge to do his office. (See 2 Inst. 176). And where a common merchant was chosen a coroner, he was removed, on the ground that he was communis mercator; (see 2 Inst. 32); but his being minus idoneus is no ground for his discharge. (See F. N. B. 163).

|| The Chief Justice of the King's Bench is by virtue of his office principal coroner of England. (See 4 Co. Rep. 57). The other judges of that court are sovereign coroners. (See 4 Inst. 173).

¶ The lord mayor of London is, by charter 18 Ed. 4, coroner of London. The bishop of Ely also has power by charter, Hen. 7, to make coroners; and there are coroners of particular lords of franchises and liberties, who by charter have authority to create their own coroners, or to be coroners themselves, especially in the jurisdiction of the admiralty as well as that of the verge. (See 1 Hale, P. C. 52; 4 Rep. 57; 1 Com. 384).

** The coroner of the county is chosen by virtue of the king's writ, de coronatore eligendo, directed to the sheriff, commanding him in full county, and with the assent of the same, to elect a person coroner who best knows and can attend to the duties of the office. (See stat. of West. 1, c. 10, 28 Ed. 3, c. 6). No persons but freeholders have a right to vote at such elections. (See 2 Hawk. P. C., c. 9, ss. 5, 10; and 58 Geo. 3, c. 95). The sole object of the 58 Geo. 3, c. 95, is to regulate the time and mode of electing coroners, and distinctly enacts that the election shall take place at the next county court after the receipt of the writ, unless that fall out to be holden within six days of the receipt of the writ; where the receipt was more than that time, and the sheriff did not at the next county court take any step: Held, that the subsequent election was void. (*In re Stafford, coroner*, 2 Russ., Ch., 475).

(*b*) As to the swearing of*.

(*c*) As to the duration of office†.

IV. RELATIVE TO THE DUTY OF THE COUNTY‡.

V. RELATIVE TO THE DUTY AND AUTHORITY OF THE CORONER.

(*a*) To act within his jurisdiction§.

Regina *v.* Grand Junction Railway, M. T. 1839. Q. B. 3 *P. & D.* 57.

The inquest should be in the county where the death takes place.

A death occurred in the county of M., from an injury received in the county of S. The coroner's inquest was held in the county of M.; and the Court decided it was properly held in the county of M.

(*b*) To take inquests.

1. *In general*‖.

3. *By whom to be taken, where there are several Coroners*¶.

* Immediately after the coroner has been elected he is to be sworn before the sheriff to the due execution of his office. (See 2 Hale, P. C. 55).

† The coroner's appointment does not determine by the death of the king, (*Anon.*, M. T. 1695, K. B., 3 Salk. 100), he being chosen for life; but he may be removed either by being made sheriff or chosen verderor, which are offices incompatible with the other; or by the king's writ, de coronatore exonerando, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part of it. (See F. N. B. 163, 164; 1 Bla. Com. 348). And by the 25 Geo. 2, extortion, neglect, or misbehaviour are also made causes of removal.

‡ Whenever an unnatural death happens, it is the duty of the township to give notice to the coroner, otherwise, if the body be interred in his absence, the township shall be amerced. (Hale, P. C. 170). It is indictable to bury a man who dies a violent death before inquest. (*Anon.*, E. T. 1701, K. B., 7 Mod. 10).

§ At common law, if any felonies or treasons were committed within any creek, or arm of the sea, which was in the body of a county, the common-law courts only had jurisdiction, and the admiral or maritime court none; but by 15 Ric. 2, c. 3, on the death of man or maihem in great ships, hovering in the main stream of great rivers, below the bridges near to the sea, the admiral shall have jurisdiction. But this clause does not exclude the county coroner, who has herein a concurrent jurisdiction with the admiralty coroner, who may take inquisitions super visum corporis, upon such deaths happening in great rivers, which are arms of the sea, that flow and reflow beneath the first bridge, within the bodies of counties, and bear great ships, where a man may see from side to side.

‖ By 7 Geo. 4, c. 64, s. 4, every coroner, "upon any inquisition taken before him, whereby any person shall be indicted for manslaughter or murder, or as an accessary to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall have authority to bind by recognisance all such persons as know or declare any thing touching the said manslaughter or murder, or the said offence of being accessary to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognisances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court, otherwise the court may fine him." (Id. s. 5).

¶ Where there are several coroners in the county, and they act judicially, as by taking an inquest, the act of one is sufficient; but where they act ministe-

4. *Within what Time to be taken*.*
5. *To summon the Jury†.*
6. *To view the Body‡.*
7. *To summon and examine Witnesses, and receive Evidence; and of the Witnesses' Expenses§.*

rially, they must all join. And it is said in the former case that, after such proceeding by any one of them, an inquest by another would be void. (See 2 Hale, P. C. 59; Staundf. P. C. 53.

* The inquest must be holden within a reasonable time after the death; hence seven months are too late. (*Rex* v. *Bond*, H. T. 1717, K. B., 1 Str. 22).

† By the 4 Edw. 1, the coroner is directed to summon his jury out of the four, five, or six of the next adjacent towns; and it was anciently so expressed in the inquisition; but this rule has not always prevailed, or any precise number of vills been required, nor is it now necessary, or can the want of it be objected to, provided they be summoned from the neighbourhood. (See 1 Sid. 204; 1 Keb. 723). The 8th Hen. 6, c. 19, enacts, that the inquiry shall be made by persons having lands of the yearly value of forty shillings, and to be summoned by the sheriff; but it is not usual in practice to return a jury with such qualifications.

‡ The view on a coroner's inquest must be by the jury and coroner at the same time; and if the body cannot be viewed, the coroner can do nothing, but the inquest must be before the justices of the peace. (*Rex* v. *Farrant*, M. T. 1819, K. B., 1 Chit. Rep. 745; S. C. 3 B. & Ald. 260; S. P. *Anon.*, M. T. 1695, K. B., 1 Salk. 100). It seems the whole of the body must be inspected. (*Rex* v. *Bond*, H. T. 1717, K. B., 1 Stra. 22).

§ It is the duty of the coroner to summon witnesses; (1 Chit. Crim. L. 164); and on the appearance of each witness the coroner is to take down his name, abode, and occupation, and then administer the oath that he shall speak the truth, &c. (See Umfr. on Coroner, 177).

And by 6 & 7 Will. 4, c. 89, s. 1, as to medical witnesses, the coroner may issue an order for the attendance of any legally qualified medical practitioner, who attended the deceased in his last illness, or, if he were not so attended, of any legally qualified medical practitioner, in or near the place of the death; and the coroner may direct a post mortem examination of the body, with or without an analysis of the contents of the stomach or intestines. (By s. 2). So, the coroner may order the attendance of other legally qualified medical practitioners, if a majority of the jury require it. (By s. 3). And where any such order shall be personally served upon such practitioner, or shall have been received by him in sufficient time for him to have obeyed it, or shall have been served at his residence, if he do not obey such order, he shall forfeit 5*l.* upon complaint thereof, made by the coroner or any two of the jury, before any two justices having jurisdiction in the parish or place where the inquest was held, or where such medical practitioner resides; and such two justices are hereby required, upon such complaint, to proceed to the hearing and adjudication of such complaint, and (if such medical practitioner shall not shew to the said justices a good and sufficient cause for not having obeyed such order) to enforce the said penalty by distress and sale of the offender's goods, as they are empowered to proceed by any act of Parliament for any other penalty or forfeiture. (Id. s. 6).

By 1 & 2 Vict. c. 68, s. 2, it is enacted, "That so much of the said act passed in the then last session of Parliament as directs the coroner to make an order on the churchwardens and overseers of the parish in which any death shall have happened for payment of the remuneration or fee payable under the provisions of that act to any medical practitioner, and as directs such churchwardens and overseers to pay the same out of the funds collected for the relief of the poor of such parish, shall be and the same is hereby repealed, and in lieu thereof the coroner shall, immediately after the termination of the proceedings at any inquest, advance and pay such remuneration or fee to every medical witness summoned under the provisions of the said act, and the amount thereof shall be repaid to the said coroner in manner (in the statute) mentioned."

Before the statute a judge would not allow a fee to a surgeon for attending at an inquest. (*Rex* v. *Taylor*, 1832, 5 C. & P. 301). It is the duty of the coroner to bind over those witnesses only who make out the case against the party charged, and not those called by him to rebut it. (*Reg.* v. *Taylor*, 1840, N. P., 9 C. & P. 672). The deposition of a witness before a coroner, and at the time of the trial of an action arising out of the same action beyond seas, held admissible. (*Sills* v. *Brown*, 1840, N. P., 9 C. & P. 601).

8. *To adjourn the Inquest* *.

9. *As to the Form of the Inquisition.*

REX *v.* EVETT, H. T. 1827. K. B. 6 *B. & C.* 247.

The inquisition must state the place of the death, finding of the body, and names of the jury†.

THE inquisition professed to be taken "upon the oath of the several persons whose names are hereunder written and seals affixed, good and lawful men," &c. The coroner and jury had all put their names, and seals were affixed; but, of the jury, some of the christian names were abridged, and two names were not completely shewn at all, the christian names being abridged to initials only. The inquisition described the death in these words:—"That the said Elizabeth Baldwin, on the 21st day of May, in the year aforesaid (1824), at the parish (Wolverton), and in the county (Bucks) aforesaid, being crossing the King's highway, situated in such parish, it so happened accidentally, casually, and by misfortune, she, the said Elizabeth Baldwin, in the attempt to cross such road, was suddenly forced to and against the ground by the leaders of a certain stage-coach, commonly called or known by the name of the Tally Ho Coach,

* If any of the witnesses be absent, or affected by undue influence, or unwilling to attend, the coroner may adjourn the inquest to another day, at the same place, or to another place, informing the jury the hour they are to attend to take and receive the evidence of all those who have not attended, first taking security from the jurors for their appearance at the adjourned time and place. After such adjournment, the coroner may grant his warrant to bury the body. (See Umfr. on Coroner, 179).

† A coroner's inquisition for manslaughter stated the inquest to have been held on the 5th of January, in the 7 Will. 4, and in the year 1837, and stated that J. M., of &c., on the 28th of December, in the year aforesaid, made an assault, &c.:—Held bad, as the offence was charged to have been committed on an impossible day. (*Rex* v. *Mitchell*, 1837, N. P., 7 C. & P. 800). But if several jurors on a coroner's inquest have the same christian and surname, it is not necessary, in the caption of the inquisition, to distinguish them by abode or addition. An inquisition for manslaughter, which charges that the principals in the second degree were "feloniously present, then and there abetting, aiding, and assisting," is bad, as the word "feloniously" only extends to the word "present." The concluding averment, "and so the jurors do say," does not require either time or place to be stated in it. (*Rex* v. *Nicholas*, 1836, N. P., 7 C. & P. 538). But a juror need not sign his christian name at length if recited in the inquisition. (*Rex* v. *Bennett*, 1833, N. P., 6 C. & P. 179). If jurors affirm, it must be stated whether Quakers or Moravians. (*Rex* v. *Polfield*, H. T. 1834, B. C., 2 D. P. C. 469). An inquest, in case of manslaughter, without the examination of a surgeon cannot be supported. (*Rex* v. *Quinch*, 1831, N. P., 4 C. & P. 571).

A coroner's jury had found, that the death of A. was occasioned by means of a locomotive engine of B. being driven against him, and that the same did "feloniously cast to the ground the said A.":—Held, not a sufficient description of the cause of the death of A. (*Reg.* v. *Stockdale*, E. T. 1840, B. C., 8 Dowl. P. C. 517).

Some of the jurors being marksmen, and their marks not being attested, the inquisition was held bad on that ground also. (Ib.)

A coroner's inquisition stated in substance, that J. D., on the 27th of May, struck M. R. with a poker on the head, and with his hands on the breast, and gave her divers mortal bruises and contusions; and that M. F., on the 23rd of June, kicked the said M. R. on the belly, and thereby gave her one mortal bruise and contusion. It then averred, that the said M. R., of the mortal bruises, &c., given by J. D., languished from the 27th of May until the 1st of July, and of the mortal bruise, &c., given by M. F., languished from the 23rd of June till the 1st of July, and then died of the mortal bruises and contusions on the head and breast, together with the mortal bruise and contusion on the belly. The conclusion was, that the said J. D., and the said M. F., her, the said M. R., in manner and by the means aforesaid, feloniously did kill and slay:—Held, bad. (*Regina* v. *Devett*, 1838, C. C. C. 8 C. & P. 639).

which was passing through such parish, by means whereof she was so much bruised and otherwise injured as to occasion her death, as to languish for the space of fifty-seven hours, and then she died." It then went on to present, that the said Elizabeth Baldwin, in manner and by the means aforesaid, came to her death, and that the said coach and horses were moving to her death, and were of the value of 80*l.*, the property of and in the possession of Humphrey Evett, William Gilbert, and Company. To this inquisition William Evett appeared and demurred.

The Court held, that it is essential to state the place of the death and finding of the body, in order to found the jurisdiction of the coroner; where these were omitted, and the names of the jurors not stated in the body of the inquisition, but only subscribed with initials, the objections were fatal.

REGINA *v.* BROWNLOW, M. T. 1839. Q. B. 8 *D. P. C.* 157; S. C. 3 *P. & D.* 52.

A CORONER'S inquisition, stating, that, on the 14th June, 1838, A. B., being on board of a certain steamer, which was then and there floating and being navigated on the river Thames, it happened that a boiler, then and there forming part of it, and which was then and there used in working it, burst and exploded, by means whereof water, cinders, &c., were thrown upon the person of A. B., whereby he then and there received a mortal shock and concussion, and thereby became mortally scalded and burnt, of which said mortal shock and concussion, and of which said mortal burn and scald, he, the said A. B., at the parish aforesaid, in the county aforesaid, instantly died. On motion—

And as to the time of the death, the word "instantly" is not equivalent to "then and there."

The Court quashed the inquisition for not averring with sufficient distinctness the time of the explosion, or the time of the death.

Ex parte CARRUTHERS, T. T. 1828. K. B. 2 *M. & Ry.* 397.

AN inquisition stated, that, on the 28th of February last, the theatre fell down and became a ruin, by which accident Maurice, and the other deceased, were killed. The materials had been claimed on the part of the Crown as a deodand by virtue of the inquisition; the part of which, relating to the materials, was as follows:—"And the jurors, &c., further say, that the said iron roof and gutters of the said messuage in Well Street aforesaid, and the slates of the said roof, and the lead and other materials thereon, and the timber and other materials of the said carpenter's and painter's shops, and of the said flys, and the girders on which the shops and flys, or some part thereof immediately preceding the said falling in and sinking, rested, and the said proscenium post, and the bricks, timber, and materials of such part of the said front external wall of the said messuage above the line hereinbefore mentioned and described, and part of the said balcony, and of the said cautitiores, (but what precise part of the said balcony, and of the said cautitiores, the jury are ignorant), were moving to or towards, or did move to or towards the said several deaths of the said (Maurice, &c.,), all, some, or one of them, at the time of the happening thereof as aforesaid. And the jurors, &c., further say, that they are ignorant of the value of the said bricks, stone, timber, materials, iron roof or cast-iron roof, gutters, lead, matters and things, so moving as aforesaid, and that

The inquisition must state the deodand with certainty.

the same is or are now lying and being in Wells Street aforesaid, or within the standing walls of the said messuage called the Brunswick Theatre, or in the yard, out-buildings, &c., within the said precinct, intermixedly and confusedly with other bricks, stones, timber, and materials, which did not move, or were not moving to the deaths aforesaid, or any of them."

Per Cur.—The inquisition need not be quashed in *toto;* it may be good as to part. But we think that which relates to the deodand is bad for uncertainty, and must be quashed.

---

10. *To take Recognisances**. See also, ante, p. 152, n.
11. *To issue Warrant for Apprehension and commit to Prison†.*
12. *To execute Process‡.*

VI. RELATIVE TO THE RIGHTS OF.

(*a*) To fees§.

* If the verdict be of that description that future proceedings will be necessary, the coroner is to bind over all proper persons to prosecute and give evidence. (See Umfr. on Coroner, 188).

† By 5 & 6 Will. 4, c. 38, s. 3, if the finding of the inquest be for murder or manslaughter, if they do not name any particular person, nothing further can be done by the coroner; but if they name any person as the offender, the coroner may commit him, if he be present, to the common gaol, or to any house of correction near to where the assizes, &c., are to be holden; if absent, he may grant a warrant to apprehend him.

‡ Where coroners act ministerially, they must also join, as when they have to summon jurors, or execute process. (*Rex* v. *Dolby*, H. T. 1822, K. B., cited Umfr. on Coroners, 144).

§ And by 1 Vict. c. 66, s. 3, it is enacted, "That every coroner, acting in and for any county, riding, division, or district, shall, within four months after holding any inquest, cause a full and true account of all sums paid by him, under the provisions of this act, including all sums paid to any medical witness as aforesaid, to be laid before the justices of the peace of such county, riding, division, or district in general or quarter sessions assembled, or at any adjournment thereof; and every coroner of every borough shall, within four months after holding any inquest, cause a full and true account of all sums paid by him under the provisions of this act, including as aforesaid, to be laid before the town council of such borough, and all such accounts shall be accompanied by such vouchers as, under the circumstances, may to such justices or council respectively seem reasonable; and such justices or council respectively may, if they shall think fit, examine the said coroner on oath as to such account, and on being satisfied of the correctness thereof, such justices or council respectively shall make an order on the treasurer of the said county, riding, division, or district, or of the said borough, (as the case may be), for payment to the coroner, not only of the sum due to him on such account, but also of a sum of six shillings and eight pence for every inquest holden by him as aforesaid, over and above all other fees and allowances to which he is now by law entitled; and the treasurer of any county, riding, division or district, on whom any such order shall be made, shall, out of the monies in his hands, arising from the county rates, and the treasurer of any borough, on whom any such order shall be made, shall, out of the monies in his hands on account of the borough fund, pay to the said coroner the sum mentioned in such order, without any abatement or deduction whatever; and every such treasurer shall, on passing his accounts, be allowed all sums which he shall pay in pursuance of any such order as aforesaid."

"And be it enacted, that this act, and the several provisions therein contained, shall extend and be applicable to the city of London, and the town and borough of Southwark."

Before 1 Vict. c. 66, "for every inquisition taken on a body dying in prison, the coroner shall be paid so much as the justices at sessions shall allow, not exceeding 20*s.*, to be paid in like manner," &c. (25 Geo. 2, c. 29, s. 2). In boroughs in

REX *v.* JUSTICES OF WARWICK, E. T. 1826. K. B. 5 *B. & C.* 430; S. C. 8 *D. & R.* 147.

THE allowance is regulated by stat. 25 Geo. 2, c. 29. It directs an allowance of 20*s.* for each inquest, "and for every mile on which the coroner shall be compelled to travel from his place of abode to take such inquisition, the further sum of 9*d.*" It was contended, it was obvious that the allowance was only for the travelling expense attending such inquest, and that, when a coroner travelled twenty miles for instance to hold an inquest at a town, and then, perhaps, immediately afterwards, held another at the same place, he was not to be allowed for travelling expenses in respect of the second inquest, as well as the first.

If two inquests be held at the same time on the same day, the coroner is not entitled to travelling expenses in each case.

The Court were of opinion, that when one travelling served for more inquests than one, it could not be charged as a *separate* travelling for each inquest.

See 1 *Vict., c.* 66, *s.* 156, *n.*

(*b*) TO APPOINT A DEPUTY.

Ex parte CARRUTHERS, T. T. 1828. K. B. 2 *M. & Ry.* 397.

IN this case it was contended, that although generally speaking the office of coroner could not be filled by deputy, there might nevertheless be a custom in particular districts for the coroner to appoint a deputy; and, as the existence of such a custom in this particular case was not negatived by the affidavits produced by the party objecting to the inquisition, the Court would presume that every thing had been done rightly, and would not quash the inquisition on that ground.

It seems a coroner may appoint a deputy*.

Bayley, J.—It does not appear conclusively upon the face of the inquisition that it was held before a deputy coroner. It is signed "Maurice Thomas, Deputy Steward and Coroner." That *may* mean that he *is* deputy steward and *not* deputy coroner, but *coroner;* for the word deputy does not necessarily override all that follows it, and apply to the office of coroner as well as to that of steward.

DAWES, *Ex parte*, M. T. 1838. K. B. 1 *P. & D.* 146; S. C. 8 *Ad. & E.* 936.

THE Court refused to grant a certiorari to bring up a coroner's inquisition to be quashed, which purported to be taken before A. B., coroner of H., but which was in reality taken before the coroner's clerk, and which was in other respects invalid.

But an inquisition taken before a coroner's clerk, and not the coroner, cannot be removed by certiorari.

VII. RELATIVE TO THE LIABILITIES OF THE CORONER†.

which a separate court of quarter sessions shall be holden, the coroner of such borough for every inquisition which he shall duly take within such borough shall be entitled to have the sum of 20*s.*; and also the sum of 9*d.* for every mile exceeding two miles he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer of the borough out of the borough fund by order of the court of quarter sessions of such borough. (5 & 6 Will. 4, c. 76, s. 62; see 1 Vict. c. 68, s. 3).

* In a prior case it was held, that a coroner cannot appoint a deputy. (*Rex* v. *Farrant*, M. T. 1819, K. B., 1 Chit. Rep. 745; S. C. 3 B. & Ald. 260). But by 6 & 7 Will. 4, c. 105, s. 6, a coroner in case of illness or unavoidable absence may appoint a deputy.

† 1*st, for Misconduct.*]—An attachment, (*Andrews* v. *Sharp*, T. T. 1733, C. P., 2 Blac. 911; S. P. *Rex* v. *Peckham*, T. T. 1778, 2 Blac. 1218), or an information

VIII. RELATIVE TO THE VERDICT*.

IX. RELATIVE TO THE PUBLICATION OF PROCEEDINGS BEFORE THE CORONER†, AND OF A STRANGER'S RIGHT TO ATTEND THE INQUEST.

GARNETT *v.* FERRAND, E. T. 1827. K. B. *6 B. & C.* 611.

A party who has no interest in an inquest may be expelled the room by the coroner.

THIS action raised the question, whether every individual may, as a right, claim to be present on a coroner's inquest. The declaration was for trespass and assault, charged to have been committed on the plaintiff, by seizing and laying hold of the plaintiff, and with force and violence and against his will, pushing, dragging, and removing the said plaintiff out of a certain room, parcel of a certain messuage, and wrongfully imprisoning and keeping and detaining him in prison for the space of one hour, contrary to the laws and customs of the realm and against the plaintiff's will. The pleas stated that the plaintiff was coroner &c., and in the room for the purpose &c.; and that plaintiff with force and arms broke and entered said room for the purpose of wrongfully and illegally taking notes and publishing the proceedings, and the said plaintiff was then and there wrongfully and illegally about to take notes of and publish the said proceedings, and would then and there wrongfully and illegally have taken notes of and published the same if he had been permitted to remain in the said room during the said proceedings, to the great

lies against a coroner for misconduct; (*Rex* v. *Scory*, M. T. 1748, K. B., 1 Leach, C. L. 43); as, where he told the jury that a verdict of felo de se and lunacy were the same. (*Rex* v. *Wakefield*, M. T. 1730, K. B., 1 Stra. 68).

2*nd, for Acts of Co-coroner.*]—One coroner is liable for the acts of his co-coroner, (*Naylor* v. *Sharply*, 1674, C. P., 1 Mod. 198; S. C. 2 Mod. 23; Freem. 191), when they act ministerially; (see Staundf., P. C., 53 a.; Hale, P. C. 58; but not when he acts judicially, as, in the taking an inquisition of death. (See 2 Hale, P. C. 59).

And 3dly, to be removed.]—A coroner will be discharged from his office for using corrupt influence over the jury. (*Rex* v. *Coates*, E. T. 1809, K. B., cited Dick. 515). And by 25 Geo. 2, c. 29, he is removable from his office for extortion, or for any wilful neglect of duty, or misbehaviour. And a new one is to be chosen in his room. (5 Co. 58 b.) And, in *Ex parte Parnell*, (1 J. & W. 451), confinement in prison for twelve months was holden a good ground for removing him, though his duties had been performed by another coroner in his absence. The practice is to issue both the writ de coronatore exonerando, and that de coronatore eligendo, at the same time, though the former must be first executed, and no notice of the issuing need be given to the party removed. He may have a commission to inquire whether the cause assigned for removal be true, but he cannot traverse it. (See 1 J. & W. 454).

* By 4 Geo. 4, c. 52, s. 1, "If the inquest find the deceased felo de se, that is, that he voluntarily killed himself, when of sound mind and of the age of discretion, the coroner shall give directions for the private interment of the remains of such person felo de se, without any stake being driven through the body of such person, in the churchyard or other burial ground of the parish or place in which the remains of such person might by the laws or custom of England be interred if the verdict of felo de se had not been found against such person; such interment to be made within twenty-four hours from the finding of the inquisition, and to take place within the hours of nine and twelve at night." By s. 2, and without the rights of Christian burial.

† The Court will grant a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. (*Rex* v. *Fleet*, 1 B. & Ald. 379; see *Rex* v. *Clement*, 4 B. & A. 218; S. C. 11 Price, 68; and *Duncan* v. *Thwaites*, 3 B. & C. 556).

hindrance of public justice and of the said inquisition; and thereupon the said T. F., in order to prevent the said plaintiff from wrongfully and illegally taking notes of and publishing the said proceedings before the termination of the said proceedings, then and there requested the said plaintiff to go and depart from and out of the said room, which the said plaintiff then and there wholly refused, and then and there remained and continued in the said room for the wrongful and illegal purpose aforesaid, and in contempt &c., and to the great delay and interruption of public justice. The removal, molliter manus imposuerunt.

Per Cur.—It does not appear that the plaintiff had any interest in the proceedings before the court, or that he was there for the purpose of aiding in the investigation by any information he had to give to the coroner or jury. Not that it would of necessity have been otherwise if he had. We are all of opinion on the general question that the plaintiff had no right to be present in opposition to the voice of the coroner. We are also unanimously of opinion that the plaintiff would have no right of civil action against the coroner, even though he had the other right of being present at the proceedings, and had been wrongfully disturbed in the exercise of it by the coroner. The court of the coroner is a court of record, of which the coroner is judge; and it has been decided that a civil action will not lie against a judge for an act done by him in his judicial character. The plaintiff has contended that the coroner's court is an open court, and that where the defendant sat upon the occasion in question there was sufficient room for him to be present without disturbing the proceedings. But, even if this be so, it is still obvious that the purposes of justice may sometimes require that an inquest should be conducted with secrecy. It is a preliminary inquiry and in no case conclusive: the result of the inquiry may not go beyond attaching suspicion to an individual, and it may be necessary that the party implicated should not have notice of the course of proceeding, or the result, lest he should elude justice. For the sake of decency too, it is frequently requisite that the proceedings should not be public. Many things may be disclosed at a coroner's inquest the publication of which to the public at large can be of no benefit to society, and may probably be very mischievous. In such cases, who is to decide? The coroner, and he alone. Nor can the grounds of his decision be brought into question by an action of trespass. A judge, coroner, sheriff, or justice has the control of the proceedings before him. If any man may choose to be present, why may he not choose his place? Such a right in individuals would lead to great confusion. In many cases it would be impossible to conduct the proceedings with due solemnity, if the judge had not the power of deciding as to such matters; and a man could not act effectually in such a situation for the ends of justice, if he were liable to be harassed by actions at the suit of individuals who imagine themselves to be wronged. If a person in the situation of a judge be supposed to fall into a mistake in point of law, it cannot be contended that a jury is a competent body to try the merits of such a question. We therefore think that a power of exclusion is a fit and proper power to be exercised by the coroner.

X. RELATIVE TO THE AMENDMENT* AND QUASHING INQUISITIONS TAKEN BEFORE A CORONER, AND OF THE REMOVAL OF.

CULLEY, *In re*, T. T. 1833. K. B. 2 *N. & M.* 61; S. C. 5 *B. & Ad.* 230.

The inquisition may be quashed at the instance of the Crown.

AN inquisition, after reciting that a public meeting had been convened, stated that the said R. C., being one of the constables of the metropolitan police, in the execution of his duty was then and there present; and that a person, to the jurors aforesaid unknown, in and upon the said R. C., in the peace of God and of our said lord the King then and there being, did then and there make an assault; and that the said person unknown, with a certain sharp instrument the said R. C., in and upon the left side of the body of him the said R. C., did then and there strike, stab, and penetrate; and that the said person unknown, by such striking, stabbing, and penetrating the said R. C. as aforesaid, did then and there give unto the said R. C., in and upon the left side of the body of him the said R. C., one mortal wound of the breadth &c., and of the depth &c., of which mortal wound the said R. C. did then and there die; and the jurors aforesaid, upon their oaths aforesaid, do say, that we find a verdict of justifiable homicide, from no riot act or any proclamation ordering the people to disperse being read; and we consider that government did not take proper measures to prevent the meeting. On motion on certiorari to quash the conviction—

Per Cur.—The inquisition states that R. C. was in the peace of God; that an assault was made, in consequence of which death ensued. Then they find that it is justifiable homicide, and state their reasons for such finding. There is no finding of any felony, for they do not use the word "feloniously;" they only find something about the character of the meeting. We think the inquisition is bad altogether, and may be quashed at the instance of the Crown.

XI. RELATIVE TO THE FORFEITURE OCCASIONED BY THE ACCUSED ABSCONDING†, AND OF THE DEODAND. See ante, p. 155, and post, tit. *Deodand.*

XII. RELATIVE TO THE ADMISSIBILITY OF PROCEEDINGS TAKEN BEFORE A CORONER‡, AND OF THE CORONER BEING A WITNESS. See tit. *Witness.*

XIII. RELATIVE TO THE PROCEEDINGS ON THE DEATH OF A CORONER§.

XIV. RELATIVE TO THE EFFECT OF THE INQUEST. See post, tit. *Inquisition.*

* The inquest may be amended in form, but not in substance. (*Rex* v. *Saloway*, E. T. 1685, K. B., 3 Mod. 100; S. P. *Rex* v. *Grafton*, T. T. 1686, K. B., Comb. 58).

† Absconding in contemplation of an after inquisition occasions a forfeiture of the property of the accused. (2 Hale, P. C. 62; Fitz. Cor. 290).

‡ It seems doubtful whether a coroner's inquisition can be given in evidence in a civil proceeding. (1 Stra. 68). Depositions before a coroner are not evidence, though he and the deponent are both dead, unless he has signed them. (2 Leach, C. L. 770; 3 Salk. 100).

§ On the coroner's death, the candidate who wishes to succeed must apply for the writ de coronatore eligendo, and produce an affidavit of the death, to be made by a person who has seen the deceased coroner, which is lodged with the clerk of the crown in Chancery, when a writ is sealed and delivered to the sheriff, and the election takes place. (Umf. on Coroner, 162; Imp. Sheriff, 205).

Corporation*.

I. RELATIVE TO THE CREATION OF.

(*a*) Before 5 & 6 Will. 4, c. 76.

1. *By Implication*, p. 168.
2. *By Charter*, p. 168.
3. *By Letters Patent*, p. 170.
4. *By Statute*, p. 170.

(*b*) Since 4 & 5 Will. 4, c. 76, p. 171.

* The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, has introduced so many important alterations with respect to the corporate bodies mentioned in the schedules to the statute, as virtually to create new corporations. It has therefore been considered desirable to give an analysis of the act, as well as an alphabetical list of corporations specified in the statute. By sections

1. Repeal of all acts, charters, and customs inconsistent with this act.
2. Reservation of all rights of property and beneficial exemptions to freemen, their wives and children.
3. No freedom to be acquired by gift or purchase.
4. Reservation of the parliamentary franchise to freemen.
5. Freemen's roll to be made out and kept by the town-clerk.
6. Corporations to be styled mayor, aldermen, and burgesses.
7. Boundaries of certain boroughs to be those settled by 2 & 3 Will. 4, c. 64. Boundaries of other boroughs to remain until altered by Parliament.
8. Every place included within the bounds of a borough to be part of such borough. Parts cut off from the borough to be declared part of adjoining county.
9. Occupiers of houses and shops, rated for three years to the relief of the poor, entitled to be burgesses, if resident householders within seven miles. Aliens and persons who have received parochial relief not to be inrolled.
10. Medical assistance or instruction in endowed schools not to be a cause of disqualification.
11. Occupiers may claim to be rated.
12. In case of titles by descent, &c., how the occupation is to be reckoned.
13. No new burgesses to be admitted who are not qualified under this act.
14. Exclusive rights of trading abolished.
15. Overseers to make lists of all persons entitled to be burgesses in their respective parishes.
16. As to boroughs in which there is no town-clerk. As to precincts, &c., where there are no overseers.
17. Persons omitted from the overseers' lists to give notice to the town-clerk. Notices as to persons not entitled to be retained in the lists. Lists of claimants, and of persons objected to, to be published, &c.
18. Mayor and assessors to revise lists, and upon due proof to insert and expunge names.
19. Power to mayor, &c., of adjourning, of administering oaths, &c. Mayor shall sign the lists in open court.
20. Barristers to be appointed to revise lists in the first year.
21. Affirmation may be substituted for oath.
22. Revised borough lists to be kept by the town-clerk, and copied into books, with the names numbered ; such book to be the roll of burgesses entitled to vote. No stamp-duty on inrolment.
23. Copies of the burgess-roll to be printed for sale.
24. Expenses of overseers, how to be defrayed.
25. Mayor, aldermen, and councillors to be chosen in every borough, who together shall constitute the council of the borough.
26. Mayor and aldermen to continue to be members of the council during their offices.
27. Future vacancies in the office of aldermen, how to be filled up.
28. Who are not qualified to be chosen mayor or councillor.
29. Who shall vote in the election for councillors.

II. RELATIVE TO THE COMPENSATION TO CORPORATE OFFICERS, UNDER 5 & 6 WILL. 4, c. 76, p. 171.

III. RELATIVE TO THE OFFICERS CONNECTED WITH.

(*a*) BEFORE 5 & 6 WILL. 4, c. 76.

1. *As to Aldermen*, p. 176.
2. *As to Articled Clerks being Burgesses*, p. 177.
3. *As to Sheriffs*, p. 177.
4. *Of removing Officers*, p. 178.

30. Councillors to be chosen on the 1st of November in every year.
31. One-third part of the council to go out of office annually.
32. Elections to be held before mayor and assessors. Mode of voting.
33. Polling booths to be provided.
34. No inquiry of the voter except as to his identity, and whether he has voted before at the same election. Forms of questions as to these points.
35. Result of election, how to be declared.
36. An alderman to be chosen to preside at election, in case of the death or inability of the mayor.
37. Election of auditors and assessors.
38. Existing mayors and councillors to go out of office, on election of councillors under this act.
39. Where boroughs are to be divided into wards, the bounds of the wards to be determined by the barristers appointed to revise the lists.
40. Number of councillors for each ward to be assigned by the barristers according to certain rules.
41. Apportionment of councillors for each ward in which the ancient division is adhered to.
42. Power to examine rate-books.
43. Councillors and assessors to be elected in wards, by the burgesses of such wards.
44. Burgesses to vote in the ward in which their property is situated.
45. Lists of the burgesses in each ward to be made out yearly.
46. Manner of proceeding, if any person is elected a councillor in more than one ward.
47. Occasional vacancies of councillor, auditor, or assessor to be filled up by fresh election.
48. Penalties on mayor, overseers, &c. neglecting to comply with provisions of this act.
49. Councillors to elect the mayor every year from the councillors.
50. Mayor, aldermen, and councillors, auditors, and assessors, not to act until they have made a declaration of acceptance of office. Aldermen, if required, to make a declaration of qualification once in three years.
51. Every burgess elected to the office of alderman, councillor, auditor, or assessor, and every councillor elected to the office of mayor, shall accept the office, or pay a fine to the borough fund. Exemptions.
52. Any mayor, alderman, or councillor, if he shall be declared bankrupt or insolvent, or absent himself from the borough, shall lose his office.
53. Penalty on persons not qualified, &c., acting as mayor, alderman, or councillor. Proviso.
54. Persons convicted of bribery disqualified from voting at any election in the borough.
55. Persons offending in any of the cases aforesaid, discovering others so offending, to be discharged from all penalties.
56. No person liable to incapacity, penalty, &c., unless prosecuted within two years.
57. The mayor to be a justice of the peace for the borough, and returning officer at elections of members to serve in Parliament.
58. Power to council to appoint town-clerk, treasurer, and other officers; and to take security for due discharge of their official duties. Salaries.
59. To pay no money but by order of council.

III. RELATIVE TO THE OFFICERS CONNECTED WITH —(*continued*).

(*b*) SINCE THE 5 & 6 WILL. 4, C. 76.

1. *As to the Crier*, p. 178.
2. *As to Sheriffs*, p. 178.

(*c*) AS TO THE ELECTION.

1. *Before* 5 *&* 6 *Will.* 4, *c.* 76.
   1. *Of the Candidate*, p. 179.
   2. *As to the Mode of Election*, p. 180.
   3. *As to invalid Elections*, p. 184.
   4. *Of the Admission*, p. 185.
2. *Since the* 5 *&* 6 *Will.* 4, *c.* 76, p. 186.

60. Officers to account, &c., according to the orders of the council.—Summary remedy against officers for not accounting, &c. Proviso. Remedy by action.
61. Councils of cities and towns which are counties to name a sheriff.
62. In certain boroughs council to appoint a coroner.
63. Coroners to make returns to secretary of state.
64. County coroners to act in other boroughs.
65. Council empowered to remove certain officers. Such officers to continue until removed.
66. Officers to receive compensation on removal; and to deliver statement of claims.
67. Compensation to be secured by bond under common seal.
68. Reservation of certain pensions and allowances.
69. All acts of the council to be decided by a majority of councillors present; one-third part of the whole number to be a quorum. Notice of meetings of council; quarterly meetings of council.
70. Council may appoint committees.
71. Charitable trustees.
72. Council to act as trustees, where corporators were ex officio sole trustees.
73. Council to appoint a limited number of councillors to be joint trustees for certain purposes.
74. Present trustees of certain acts continued for a definite time. Trustees not to go out of office by reason of ceasing to be of the council until the time prescribed by the terms of the trust.
75. Powers vested in trustees may be transferred to councillors.
76. A watch committee to be appointed, to consist of the mayor and councilmen; such committee to appoint constables for the borough. Constables to be for the county, &c., as well as borough.
77. Watch committee to make regulations for the management of the constables.
78. Power to constables to apprehend disorderly persons, &c.
79. Constables attending at the watch-houses in the night may take bail by recognisance from persons brought before them for petty misdemeanors, such recognisance to be conditioned for the appearance of the parties before a magistrate. In default of appearance recognisance to be forfeited. Time of hearing may be postponed.
80. Penalties on constables for neglect of duty.
81. Penalty for assaults on constables. Proviso.
82. Regulation and payment of expenses. Rewards for activity, &c.
83. Magistrates to appoint annually a certain number of persons to act as special constables. Payment of special constables.
84. On notice of appointment of constables, the present provisions in local acts as to watching, &c. to cease. Watch-boxes, arms, &c., to be given up for the use of the constables appointed under this act. Penalty for not giving them up.
85. Proviso as to rates in arrear and as to debts.
86. Watch committee to transmit a report quarterly to the secretary of state; and also a copy of their rules, &c.
87. Power for council to order parts of a borough not within a local act as to lighting to be included in such act. Proviso as to amount of rate for lighting.

IV. RELATIVE TO THE DUTIES OF.

(*a*) Before 5 & 6 Will. 4, c. 76, p. 188.

(*b*) Since 5 & 6 Will. 4, c. 76, p. 188.

88. Council may assume the powers of inspectors under 3 & 4 Will. 4, c. 90, for lighting any part of the borough not within a local act for lighting the same.

89. Act not to interfere with the regulations for the government, &c. of dock-yards, arsenals, &c.

90. Council to have power to make bye-laws.

91. As to breaches of bye-laws.

92. All corporate property and all fines received to be carried to the account of the borough fund. Payment of debts &c., salaries of recorder, town clerk, treasurer, and other officers, and election expenses to be paid out of such fund. Application of surplus; if the fund be insufficient, the council shall order a rate to make up the deficiency.

93. Accounts of receipts and disbursements to be kept, audited, and published.

94. Power of sale and leasing restrained.

95. The council of any borough under this act authorized to renew leases, &c.

96. Leases of certain buildings, and of ground for building on, or for making gardens, &c., may be made for seventy-five years.

97. Collusive purchases, sales, and demises of corporate property, since the 5th June, 1835, for undue consideration may be set aside.

98. His Majesty's commission may be issued for certain persons to act as justices in any of such boroughs.

99. Council may make bye-laws on which the Crown may appoint salaried justices.

100. Council to provide a police office.

101. Justices need not be qualified by estate. Such justices not to sit in courts of gaol delivery, &c.

102. Justices to appoint a clerk, who shall not be clerk of the peace, or an alderman or councillor, nor be concerned in the prosecution of offenders committed by the borough justices.

103. His Majesty may grant a separate court of quarter sessions, and appoint a recorder in certain boroughs. Recorder to be a justice of the peace for the borough; but not a member of Parliament for the borough, alderman, councillor, or police magistrate.

104. Recorder and justices to make declaration before acting.

105. Sessions of the peace to be held for the borough, of which the recorder to be the sole judge. Recorder not to make or levy county rate, &c.

106. Mayor, in the absence of the recorder and deputy recorder, may open and adjourn the court.

107. Capital jurisdictions, and all other criminal jurisdictions in boroughs other than are specified in this act, abolished.

108. Chartered admiralty jurisdictions abolished.

109. Certain exceptions in 38 Geo. 3, c. 52, repealed. Berwick-upon-Tweed to be a county of a town. As to trial of offences committed in counties of cities and towns corporate.

110. Offenders committed to borough sessions whose jurisdiction is taken away to be tried in the adjoining county.

111. County justices to have jurisdiction in all boroughs which have not a separate court of quarter sessions of the peace under this act.

112. Certain boroughs not to be assessed to county rates.

113. Boroughs to pay the expenses of prosecutions at the assizes.

114. Treasurers of counties to keep an account of expenses of prosecution of offenders sent by such boroughs for trial at the assizes, and make order on them for payment thereof. In case of difference respecting such account, the same to be referred to arbitration, as provided in 5 Geo. 4, c. 85.

115. Council may contract for committing prisoners to the gaol of another borough, if sufficient.

116. Council of certain boroughs to have the same powers under the acts 4 Geo. 4, c. 64, and 5 Geo. 4, c. 85, as justices of peace have at their sessions in counties.

117. Boroughs to pay a proportion of the other county expenditure.

118. Borough courts of record to be holden as heretofore, but in certain cases with extended jurisdiction. Proviso.

V. RELATIVE TO THE PRIVILEGES OF, SINCE 5 & 6 WILL. 4, c. 76, p. 190.

VI. RELATIVE TO THE RIGHTS OF, AND LIABILITIES OF.

(*a*) In general, before 5 & 6 Will. 4, c. 76, p. 190.

(*b*) To make bye-laws.

1. *Before* 5 & 6 *Will.* 4, *c.* 76, p. 192.

2. *Since* 5 & 6 *Will.* 4, *c.* 76, p. 196.

VII. RELATIVE TO CUSTOMS CONNECTED WITH, p. 197.

VIII. RELATIVE TO THE JURISDICTION OF JUSTICES UNDER 5 & 6 WILL. 4, p. 197.

IX. RELATIVE TO THE COURTS WITHIN THE 5 & 6 WILL. 4, c. 76, p. 198.

X. RELATIVE TO THE BOROUGH RATE UNDER THE 5 & 6 WILL. 4, c. 76, p. 199.

119. Council to appoint registrar and other necessary officers of the court.
120. Existing suits not to abate by reason of the change of jurisdiction.
121. Who to be jurors. Summoning of jurors, &c. Fine on jurors for non-attendance.
122. Members of the council, &c. exempt from serving on juries; burgesses of boroughs which have quarter sessions exempt from juries of county quarter sessions.
123. All chartered exemptions from serving on juries abolished. 6 Geo. 4, c. 50, in part repealed.
124. Fees payable to the clerk of the peace, clerk to the magistrates, and registrar and officers of the court of record.
125. Table of fees to be hung up.
126. Application of penalties.
127. Limitation of time for prosecution of offences punishable on summary conviction.
128. Power to summon witnesses. Penalty for disobedience of summons, &c. No witness or justice to be incompetent on the ground of ratability.
129. Payment of penalties may be levied by distress or offender imprisoned.
130. Form of conviction.
131. Appeal against convictions under this act.
132. No certiorari, &c., as to informality in warrants, &c.
133. Venue in proceedings against persons acting under this act. Notice of action; general issue; tender of amends, &c.
134. Jurisdiction of the Cinque Ports preserved.
135. Jurisdiction of the Cinque Ports further preserved. Proviso as to juries in the Cinque Ports' liberties.
136. Act not to affect letters patent founding a grammar school at Louth.
137. Saving of the rights of the universities of Oxford and Cambridge.
138. Not to affect jurisdiction over precincts of cathedrals nor rights of university of Durham.
139. In cases where bodies corporate are seised in their corporate capacity of advowsons, &c., the same may be sold as ecclesiastical commissioners may direct. Vacancy arising before sale to be applied by bishop of the diocese.
140. Periods connected with first registration and election may be deferred by order in council.
141. The king empowered to grant charter of incorporation.
142. Interpretation clause.
143. Act may be altered this session.

XI. RELATIVE TO THE REMEDIES CONNECTED WITH.

(*a*) Before 5 & 6 Will. 4, c. 76.

1. *Actions by*, p. 203.
2. *Actions against*, p. 203.
3. *Evidence and Witnesses*, p. 203.

(*b*) Since the 5 & 6 Will. 4, c. 76.

1. *Of the Form of Action*, p. 204.
2. *On what Contract maintainable*, p. 206.

The statute includes the following corporation boroughs, which are to have a commission of the peace:—By section 1—

Aberystwith,
Abingdon,
Barnstaple,
Bath,
Bedford,
Berwick-upon-Tweed,
Bridgewater,
Bridport,
Bristol,
Bury St. Edmunds,
Cambridge,
Canterbury,
Cardiff,
Carlisle,
Carmarthen,
Caernarvon,
Chester,
Chichester,
Colchester,
Dartmouth,
Denbigh,
Derby,
Devizes,
Dorchester,
Dovor,
Durham,
Evesham,
Gateshead,
Gloucester,
Guildford,
Harwich,
Haverfordwest,
Hereford,
Hertford,
Kidderminster,
Kingston-upon-Hull,
King's Lynn,
Leeds,
Leicester,
Leominster,
Lichfield,
Liverpool,
Macclesfield,
Monmouth,
Neath,
Newark,
Newcastle-under-Lyne,
Newcastle-upon-Tyne,
Newport, Monmouth,
Newport, Isle of Wight,
Northampton,
Norwich,
Nottingham,
Oxford,
Pembroke,
Poole,
Portsmouth,
Preston,
Reading,
Ripon,
Rochester,
St. Albans,
Sarum, New,
Scarborough,
Shrewsbury,
Southampton,
Stafford,
Stamford,
Stockport,
Sudbury,
Sunderland,
Swansea,
Tiverton,
Truro,
Warwick,
Wells,
Weymouth and Melcombe Regis,
Wigan,
Winchester,
Windsor,
Worcester,
Yarmouth, Great.

By section 2—

Andover,
Banbury,
Beverley,
Bewdley,
Bideford,
Boston,
Brecon,
Bridgnorth,
Clitheroe,
Chesterfield,
Congleton,
Coventry,
Deal,
Doncaster,

XI. RELATIVE TO THE REMEDIES CONNECTED WITH —(*continued*).

3. *Changing the Venue*, p. 206.
4. *Pleas*, p. 206.
5. *Evidence and inspection of Corporation Books*, p. 207.
6. *Witnesses*, p. 207.
7. *Costs*, p. 208.

XII. RELATIVE TO CORPORATIONS FOREIGN, AND SCOTCH BURGHS, p. 209.

Exeter,
Falmouth,
Grantham,
Gravesend,
Grimsby,
Hastings,
Kingston-upon-Thames,
Lancaster,
Lincoln,
Liskeard,
Louth,
Ludlow,
Maidstone,
Maldon,
Newbury,
Oswestry,
Penzance,
Plymouth,
Pontefract,
Richmond,
Romsey,
St. Ives,
Saffron Walden,
Stockton,
Tewkesbury,
Walsall,
Welchpool,
Wenlock,
Wisbeach,
York.

Boroughs which are not to have a commission of the peace unless on petition and grant:—By section 1—

Arundel,
Beaumaris,
Cardigan,
Llanidloes,
Pwllheli,
Ruthin,
Tenby,
Thetford.
Totnes,

By section 2—

Basingstoke,
Beccles,
Blandford Forum,
Bodmin,
Buckingham,
Calne,
Chard,
Chippenham,
Chipping Norton,
Daventry,
Droitwich,
Eye,
Faversham,
Folkestone,
Flint,
Glastonbury,
Godalming,
Godmanchester,
Helstone,
Huntingdon,
Hythe,
Launceston,
Llandovery,
Lyme Regis,
Lymington,
Maidenhead,
Marlborough,
Morpeth,
Penryn,
Retford, East,
Rye,
Sandwich,
Shaftesbury,
South Wold,
South Molton,
Stratford-on-Avon,
Tamworth,
Tenterden,
Torrington,
Wallingford,
Wycombe Chepping.

As connected with corporations see also 2 Will. 4, c. 69; 2 Will. 4, c. 80; 6 & 7 Will. 4, c. 103; 6 & 7 Will. 4, c. 104; 6 & 7 Will. 4, c. 105; 7 Will. 4, and 1 Vict. c. 19; 7 Will. 4 & 1 Vict. c. 81; 1 & 2 Vict. c. 5; 1 & 2 Vict. c. 15; 1 & 2 Vict. c. 31; 1 & 2 Vict. c. 35; 2 & 3 Vict. c. 27; 3 & 4 Vict. c. 28; 4 & 5 Vict. c. 48.

I. RELATIVE TO THE CREATION OF.

(*a*) Before 5 & 6 Will. 4, c. 76.

1. *By Implication.*

Conservators of the River Tone *v.* Ash, M. T. 1829. K. B. 10 *B. & C.* 349.

Though there be not express words in a statute, persons may become a corporation by implication.

By the several provisions of the acts for a local navigation conservators were empowered to purchase lands in fee to them and their successors, to make bye-laws affecting strangers using the navigation, and the acts of any five of the committee appointed by the majority, under their hands and seals, were to bind the whole; and they were directed also to sue and be sued by the name of the Conservators of the river T., in the county of S.

The Court held, that it clearly appearing, that they should take such lands by succession, and not by inheritance, although not created a corporation by express words, they were so by implication, and were therefore entitled to sue in their corporate name for injuries done to their lands, and were also entitled to receive the tolls as part of the profits of the lands, of which an account was to be rendered.

---

2. *By Charter.*

Rex *v.* Hughes, H. T. 1828. K. B. 7 *B. & C.* 708; S. C. 1 *M. & Ry.* 625.

There is no particular mode of notifying the acceptance of a charter; it may be by electing a corporate officer under it.

From inattention or other causes, the definite parts of the corporation had become so reduced as to be no longer capable of performing corporate acts, whereupon petitions for a new charter were presented and signed by a great majority of the remaining members of the indefinite and governing bodies in the old corporation, and of the indefinite body of burgesses; but a counter petition was also signed by a smaller number, who employed an attorney to oppose the grant of the new charter, summon meetings, &c.: it appeared, that upon the grant of the new charter many of the burgesses voted at a meeting for the election of a town-serjeant under it, thereby shewing their acceptance of it, and others, having been deterred by the tumultuous proceedings, signed a written declaration of assent thereto constituting together a majority of the whole body of burgesses—

The Court held, that, in the absence of any known and settled mode of notifying the acceptance of a charter, what had been done was sufficient and a valid acceptance.

Rex *v.* Westwood, M. T. 1825. K. B. 4 *B. & C.* 781; S. C. 7 *D. & R.* 267; S. C. 7 *Bing.* 1.

But a corporation cannot accept a charter as to part.

Per Cur.—The demurrer raises the question, whether a charter can be partially accepted. This point has often been agitated obiter since the case of *Rex* v. *The Vice-Chancellor of Cambridge*, (3 Burr. 1647), but has never been decided; but, until a contrary opinion was intimated by Lord *Mansfield* in that case, it does not appear to have been doubted that a charter must be accepted or rejected in toto.

REX *v.* HAWTHORNE, E. T. 1826. K. B. 5 *B. & C.* 410 ; S. C. 8 *D. & R.* 228.

A charter was granted upon petition from the Commons in Edward 3, and promised to be confirmed under the great seal, and was accordingly done so by subsequent charter :—Held, that not being a joint act of the legislature, it might be varied by subsequent charter.

UPON a petition from the Commons it appeared, by an ancient Parliament-roll, that the Commons, by their petition exhibited in Parliament, prayed King Edward the Third that the charter made to his liege subjects, burgesses of the town of Bristol, and the franchises by him granted to his said burgesses, should be ratified and confirmed in that Parliament. The answer to the petition was, that it was assented and agreed in Parliament that the franchises whereof the petition made mention should be ratified and confirmed under the King's great seal. The charter was ratified by King Edward the Third accordingly.

The Court held, that, notwithstanding such parliamentary recognition, it was a proceeding not the joint act of the legislature, so as to prevent the Crown from granting in future any valid charter varying its provisions; and amongst other things, the mode of electing officers.

TOBACCO-PIPE MAKERS' COMPANY *v.* WOODROFFE, H. T. 1828. K. B. 7 *B. & C.* 838; S. C. 8 *D. & R.* 531.

The Tobacco-pipe Makers' Company's charter only applies to admitted members, and not all over the kingdom, as it professes.

BY charter: "We do will, ordain, &c., that our said subjects, the tobacco-pipe makers, within our said cities of London and Westminster, and our kingdom of England and dominion of Wales, and every of their apprentices whatsoever, when they shall have served as apprentices in and unto the said art, mystery, or trade by the space of seven years at the least, and all and every other person and persons who have or hath served as apprentices to the said trade, or have used the said trade by the space of seven years, and all others which hereafter from time to time shall be admitted or made free of the said society in such manner as hereafter in these presents is declared and specified, shall be from thenceforth for ever hereafter one fellowship and one body corporate and politic in deed and in name, by the name of the Master, Wardens, Assistants, and Fellowship of the Company of Tobacco-pipe Makers of our said cities of London and Westminster, and our kingdom of England and dominion of Wales." It then went on to confer the usual powers, and imposed the usual liabilities; it provided for a common seal ; it named the first master, the first set of wardens and assistants, the first beadle, clerk, &c., and provided for the election of the future officers of these several descriptions; and it expressly gave power to the company to "set or impose a reasonable fine, mulct, or sum of money, not exceeding the sum of 10*l.*, upon all and every such person and persons as shall be at any time hereafter elected or chosen to the said several offices or places of master, wardens, and assistants, or any of them as aforesaid, and shall refuse to undergo and accept the same;" and a power was added to levy such fine by way of distress.

Per Cur.—The first objection to the charter was, that it proposed to bind all persons who should carry on the trade. We do not find it necessary to answer that general objection, because the defendant was himself a member of the company; and we are of opinion that at all events the charter is good to bind members. The second objection was, that the charter gave the corporation no place; but we are of opinion that "London or Westminster, and

within three miles thereof," is sufficient to establish a local jurisdiction. The charter, then, is good; at least for the present purpose.

---

3. *By Letters Patent.*

MAYOR OF LYME REGIS *v.* HENLY, H. T. 1831. K. B. 3 *B. & Ad.* 77; S. C. 5 *Bing.* 91; S. C. 3 *M. & P.* 278.

Upon a grant of letters patent to a corporation from the Crown as a consideration for repairing sea-walls, &c., the acceptance of the letters patent renders the corporation liable to repair the walls.

BY letters patent the king granted to the mayor and burgesses of Lyme Regis, the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c. belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed that the mayor and burgesses and their successors, all and singular the buildings, banks, sea-shores, &c., within the said borough thereto belonging, or situate between the same and the sea, and also the said pier &c., at their own costs and charges thenceforth for ever, should repair, maintain, and support, as often as it should be necessary.

The Court held, first, that the mayor and burgesses of Lyme having accepted the charter became legally bound to repair the buildings, banks, sea-shores and mounds; secondly, that this obligation being one which concerned the public, an indictment would lie in case of non-repair against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual.

---

4. *By Statute.*

JEFFREYS *v.* GURR, M. T. 1831. K. B. 2 *B. & Ad.* 833.

Under a statute persons may be a corporation for some purposes and not for others.

BY act of 42 Geo. 3, c. lvi., for enlarging &c. the poor-house of the parish of Chatham, certain persons and their successors were nominated guardians of the poor and trustees for putting the act into execution; by different sections of the act they were empowered to raise money by mortgage or grant of annuity, to purchase and to take a conveyance to themselves and their successors; by the 39th section they were to sue and be sued in the name of their treasurer for the time being, and he was to be reimbursed out of the monies received by the guardians under the act for all costs, damages, and charges that he should be put to as plaintiff or defendant in any such action. The plaintiff, in 1805 and 1820, was duly elected treasurer to the said guardians under the provisions of the act, and continued in office from 1805 to 1811, and from 1820 to 1828. As such treasurer, in 1808 he obtained a decree from the Court of Chancery in favour of the parish of Chatham, who were adjudged to be entitled in respect of a particular district to $\frac{2}{32}$ parts of the rents &c. arising from a certain fund called Watt's Charity; and the sum of 1115*l.* 12*s.* 4*d.* was paid over to him as such treasurer on that account. This sum in 1822, the plaintiff, by order of the then guardians, paid over to them. On the petition of the inhabitants of the particular district within the parish of Chatham, praying that the $\frac{2}{32}$ parts of the rents &c. of Watt's charity might be applied to the exclusive use of Chatham intra, the plaintiff, after he ceased

to be treasurer, was ordered by the Court of Chancery to pay the sum which he had received as treasurer to the guardians into court, that the proceeds might be applied to the exclusive benefit of Chatham intra, which was done.

Per Cur.—We are of opinion that the guardians are a body having perpetual succession, and, for the purposes of suing and being sued, a corporation; and, therefore, that the plaintiff was entitled to recover from the now guardians the sum so paid by him as money paid to their use.

(*b*) Since 4 & 5 Will. 4, c. 76.

Corporation of Ludlow *v.* Tyler, 1836. N. P. 7 *C. & P.* 537.

Per Patteson, J.—I believe, that, under the Municipal Reform Act, there is no such thing as a new corporation.

It seems that the 5 & 6 Will. 4, c. 76, does not create a new corporation.

Rex *v.* Greene, T. T. 1836. K. B. 1 *N. & P.* 631; S. C. 6 *A. & E.* 458.

It appeared by affidavits, that there never had been an incorporation, but that the borough holders were grantees of certain freehold burgages for purposes of trade—

A place being named in the Municipal Corporation Act is only primâ facie evidence that it is a corporation.

The Court refused a mandamus to compel the delivery of the documents and surrender of the property, although the insertion of a place in the Municipal Reform Act is primâ facie evidence of a municipal corporation there.

II. RELATIVE TO COMPENSATION TO CORPORATE OFFICERS UNDER 5 & 6 WILL. 4, c. 76.

Regina *v.* Liverpool Corporation, E. T. 1838. Q. B. 3 *N. & P.* 280.—S. P. Rex *v.* Mayor of Bridgewater, T. T. 1836. Q. B. 1 *N. & P.* 466; S. C. 6 *A. & E.* 347.

By the Liverpool Local Act the corporation were authorized to appoint one or more minister or ministers to churches erected

The compensation clauses* as

* By 5 & 6 Will. 4, c. 76, s. 66, it is enacted, "That every officer of any borough or county, who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office under the provisions of this act, or who shall not be re-appointed as aforesaid, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, regard being paid to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and every person entitled to such compensation as aforesaid shall deliver to the town-clerk, or in case such person shall himself be town-clerk, then to the treasurer of the borough, a statement under the hand of such person, setting forth the amount received by him or his predecessors, in every year, during the period of five years next before the passing of this act, on account of the salary, fees, emoluments, profits, and perquisites, in respect whereof he shall claim such compensation, distinguishing the office, place, situation, employment, or appointment, in respect whereof the same shall have been received, and containing a declaration that the same is a true statement, according to the best of the knowledge, information, and belief of such person, and also setting forth the sum claimed by him as such compensation; and the

to officers are to be construed liberally.

under the act, and the applicant had been appointed lecturer under a minister, and filled the office above seven years.

The Court held the compensation clauses under the Municipal Cor-

town-clerk, or treasurer, as the case shall be, shall lay such statement before the council, who shall take the same into consideration, and determine thereon; and immediately upon such determination being made, the person preferring such claim, if he shall not himself be the town-clerk, shall be informed by notice in writing, under the hand of the town-clerk, and in case such claim shall be admitted in part, and disallowed in part, such notice shall specify the particulars in which the same shall have been admitted and disallowed respectively; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon, or in case one-third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive, it shall be lawful for the person preferring such claim, or any member of the council who shall subscribe such protest, to appeal to the lords commissioners of his Majesty's treasury, who shall thereupon make such order as to them shall seem just; and such order, signed by three or more of such lords commissioners, shall be binding on all parties: provided always, that if the council shall not determine on such claim within six calendar months after the aforesaid statement shall be delivered to the town-clerk or treasurer, as the case shall be, such claim shall be considered as admitted; provided also, that it shall not be lawful for any member of the council to subscribe such protest as aforesaid, except within such period of six calendar months; provided also, that the person preferring such claim, if any member of the council shall so require, upon receiving notice in writing signed by the town-clerk, unless such person shall himself be town-clerk, in such case no such notice shall be requisite, shall, from time to time, attend at any meeting, or adjourned meeting of the council, for the investigation of such claim, and then and there, upon his oath, or solemn affirmation, to be taken or made before the mayor, (who is hereby authorized to administer the same), shall answer all such questions as shall be asked by any member of the council, touching the matters set forth in the statement subscribed by such person as aforesaid, and produce all books, papers, and writings in his possession, custody, or power relating thereto; provided also, that every such officer, who shall be continued in, or re-appointed to such office, under the provisions of this act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act, and had not been continued in or re-appointed to such office."

By sect. 67, it is enacted, "That the sum payable to any person as such compensation as aforesaid shall be secured to such person by bond or obligation under the common seal of the borough out of whose funds the same shall be payable in a sufficient penalty, conditioned for the payment to such person, his executors or administrators or assigns, of such sum, with all arrears thereof (if any) accrued due before the date of such bond; and such bond or obligation shall be prepared and executed at the expense of the borough fund, and delivered to the person entitled to such compensation as soon as conveniently may be after the amount thereof shall have been admitted as aforesaid by the council of the borough, or shall have been determined in the event of such appeal as aforesaid by order of the said lords commissioners."

By sect. 68, it is enacted, "That all pensions and allowances granted on or before the 5th of June in this present year, by the corporate body named in the said schedules (A.) and (B.), in conjunction with any borough, to any retired officer or servant, or to the widow or child of any officer or servant, and all stipends and allowances which during seven years next before the said 5th of June have been usually paid and granted to the minister or late minister of any church or chapel, or to the master or usher of any school, or to the governor or master of any hospital within such borough, and all charitable allowances which have been usually paid as aforesaid to the inmates of any almshouses by such corporate body, shall be secured as soon as conveniently may be after the passing of this act to every person entitled or accustomed to have and receive the same, by bond or obligation, under the common seal of the borough out of whose funds the same shall be payable, in a sufficient penalty conditioned for the payment to such person, his executors and administrators, of such pension, stipend, or allowance, with all arrears thereof, (if any), accrued due before the date of such bond; and such bond or obligation shall be prepared and executed at the expense of the borough fund."

oration Act were to be construed liberally, that he was to be leemed a minister within the meaning of the Municipal Act, and not of the local one, and that he was entitled to compensation; and it made no difference that the office was created voluntarily by the corporation, and not by the local act.

EX PARTE HARVEY, H. T. 1838. Q. B. 3 *N. & P.* 159; S. C. 7 *A. & E.* 739.

The officer must be a chartered officer,

ON motion for a mandamus to the lords of the treasury, calling upon them to award compensation to Mr. Harvey who had formerly held the office of assistant chamberlain to the corporation of Bath, but had been deprived of it under the new act, 5 & 6 Will. 4, c. 76. It appeared that by a resolution of the corporation in 1810, the then chamberlain of that city was empowered to appoint an assistant chamberlain. He reported that Mr. Harvey was a proper person to fill that office, and a yearly salary of 100*l.* was paid to him by the corporation since that time. Conceiving that he was entitled to compensation under the 5 & 6 Will. 4, c. 76, s. 66, Mr. Harvey preferred his claim to the town-council, who rejected it: he appealed to the lords of the treasury, and they decided that he was not entitled to compensation. It was urged that their decision was erroneous in point of law, and that therefore they might be compelled by this court to award compensation. (*The King* v. *The Mayor of Bridgewater,* 1 N. & P. 466; S. C. 6 Ad. & E. 347, was cited).

Per Cur.—This is fairly distinguishable from the Bridgewater case. There the party by virtue of his office of town-clerk was entitled to the office of clerk to the justices. But it is impossible to say in this case that there was any corporate office. It is nothing more than if they had recommended an attorney, who was in their service, to employ a clerk. The officer must be a chartered officer.

REGINA *v.* MAYOR OF POOLE, T. T. 1837. Q. B. 3 *N. & P.* 119; S. C. 7 *Ad. & E.* 730.

and a borough officer.

A LOCAL act authorized the corporation of P. to appoint or displace certain port officers, and amongst others a quay-master, and assign salaries out of the wharfage duties.

The Court held, 1st, that the town-council, under 5 & 6 Will. 4, c. 76, being by sect. 72 made trustees for executing all acts relating to the borough, having removed the quay-master appointed before that act, were to be deemed to have so displaced him under the local act, and that he was not entitled to compensation under the Municipal Reform Act; and 2ndly, that if the office were not a borough office, the lords of the treasury had no jurisdiction to award compensation, and a rule for a mandamus to the corporation to execute the bond for payment of an annuity awarded refused.

REGINA *v.* MAYOR OF CARMARTHEN, H. T. 1839. Q. B. 3 *P. & D.* 35; S. C. 11 *A. & E.* 9.

The clerk to the borough justices is entitled to compensation.

BEFORE the passing of the 5 & 6 Will. 4, c. 76, A. had acted as clerk to the justices of a corporation; and who, though not formally appointed, had always been recognised and paid by the corporation; and though the office was not named in the charter, it was held that

on his removal by the justices appointed under this act he was entitled to compensation. The council having refused to give any, and the lords of the treasury having, on appeal, ordered an annuity of 66*l.* to be paid to him, the Court granted a mandamus requiring the corporation to execute a bond for the amount, according to the provisions of s. 67.

REGINA *v.* MAYOR OF YORK, E. T. 1840. K. B. 8 *D. P. C.* 502.

So, is an attorney practising in a Court confined to a limited number.

ON the question whether an attorney of the sheriff's court, York, where a limited number only were allowed to practise, and who paid a consideration for their privilege, was entitled to compensation under the 66th section, the court having been thrown open to every attorney of the superior courts at Westminster by sect. 119 of the 5 & 6 Will. 4, c. 76—

The Court held that he was entitled to compensation.

REGINA *v.* CORPORATION OF CAMBRIDGE, M. T. 1840. Q. B. 4 *P. & D.* 294.

So, a corporate officer, only in office de facto, is still entitled to compensation;

H. HAD in 1833 been elected town-clerk of Cambridge quamdiu &c. He had held the office up to January 1836, (when he was removed by the new town-council); but he had neglected to make the declaration required by 9 Geo. 4, c. 17. It was held that, as he had been town-clerk de facto, and had discharged the duties of the office, he was entitled to compensation.

REGINA *v.* LORDS OF THE TREASURY, T. T. 1839. Q. B. 2 *P. & D.* 498; S. C. 10 *Ad. & E.* 734.

but where, after the 5 & 6 Will. 4, a town-clerk was re-appointed, he refused to accept the office:—Held, that the lords of the treasury were right in refusing compensation.

L. WAS elected in 1833 to the office of common clerk of the borough of S., and held it until the passing of the Municipal Corporation Act in 1835. The office in question comprehended the duties of town-clerk, clerk of the peace, and clerk of the justices. This office having been abolished by the Municipal Corporation Act, he was elected to the office of town-clerk, which he refused to accept; he then applied to the town-council for compensation in respect of the loss of his office, but was refused all compensation. He then appealed to the lords of the treasury, under the 66th section of the act. The determination of the lords of the treasury was contained in the following minute: "Upon a full consideration of the circumstances, my lords consider that as Mr. L. was re-elected to the office of town-clerk, he is not entitled to the compensation sought for such part of his emoluments as appertains to the office of town-clerk; but as he was not re-elected to the clerk of the peace or clerk to the magistrates, he is fully entitled to compensation for the loss of the emoluments which he would have ceased to enjoy, although he had continued as town-clerk after his re-election, these emoluments having been received by the common clerk acting as clerk of the peace and clerk of the justices." A rule having been obtained calling upon the lords of the treasury to shew cause why a mandamus should not be granted, commanding them to hear and determine L.'s claim, and to award him compensation—

The Court discharged the rule, on the ground that it sufficiently appeared that they had heard and determined the claim, and that the act of Parliament made their determination final.

LEE, *Ex parte*, E. T. 1837. Q. B. 2 *N. & P.* 63; S. C. 6 *Ad. & E.* 139.

Where the lords of the treasury refuse compensation,

A. HAD been appointed town-clerk nine days before the passing of the Municipal Act, and was removed on the 1st of January following—

The Court held, that he was entitled to a nominal compensation; but as compensation had been refused both by the council and the lords of the treasury, it would not, under the circumstances, grant a mandamus to the council to assess a compensation.

REX *v.* MAYOR OF BRIDGEWATER, &c., T. T. 1837. Q. B. 1 *N. & P.* 466.

or where the lords of the treasury decide a particular officer is entitled to compensation, the Court refused to interfere.

PRIOR to the passing of 5 & 6 Will. 4, c. 76, the office of clerk to the justices of the borough had always been held and exercised by the town-clerk, and after that act, and the granting a separate commission to the borough, another clerk to the justices had been appointed, and upon application to the lords of the treasury, the former clerk had been held entitled to an annuity as a compensation for the loss of the office—

The Court held, that the word "office" in the act was not to be strictly construed, and that the office of which the party had been deprived was one intended to be compensated, and as to which, the lords of the treasury having jurisdiction, their decision was final.

REGINA *v.* NORWICH CORPORATION, T. T. 1839. Q. B. 8 *Ad. & E.* 633.

As, where the lords of the treasury decided a compensation as if the office had been for life.

THE steward of a borough had been removed under 5 & 6 Will. 4, and had claimed compensation as for an office for life, but the town council had allowed compensation as for an annual office only. The lords of the treasury, on appeal, and on hearing the facts of the case, from which it appeared that, though the office was not legally holden for life, yet that it had usually been so, and that the appointment was accepted on that understanding, awarded compensation as for the loss of an office for life.

The Court of Queen's Bench held, that the lords of the treasury were not bound to consider only the legal tenure, but might, referring to all the circumstances of the case, award compensation as for an office held for life.

REGINA *v.* THE LORDS OF THE TREASURY, T. T. 1839. Q. B. 2 *P. & D.* 369.

The compensation given by the lords of the treasury is final;

UNDER the old charter, the town-clerk performed the offices of clerk of the peace, clerk to the justices, and of town-clerk; and on the passing of 5 & 6 Will. 4, c. 76, the claimant was offered to be re-appointed town-clerk, which he refused; and on appeal to the lords of the treasury for compensation, he was allowed for the loss of the former office only.

The Court considered that their compensation had been made on consideration of all the circumstances of the case, and was final, and refused a mandamus.

REGINA *v.* CORPORATION OF WARWICK, M. T. 1840. Q. B. 11 *A. & E.* 757; S. C. 3 *P. & D.* 429.

though, in a subsequent case, it was held that the lords of the treasury have no right to inquire whether an officer was properly removed or not.

A TOWN-CLERK had been re-appointed and afterwards dismissed, and had applied to the town-council for compensation, which was refused; and the lords on appeal had also refused compensation, being satisfied, on inquiry, with the cause of dismissal.

The Court of Queen's Bench granted a mandamus, calling on the council to assess compensation to the claimant notwithstanding the decision of the lords of the treasury, whose order and affirmation of what had been done by the town-council were not of any effect, they having no jurisdiction to inquire into such a matter; and said, it is now clear that the lords of the treasury have not any jurisdiction to inquire whether an officer has or has not been removed for sufficient causes within this section, or whether the office is one within the meaning of the act, so as to entitle the person removed to any compensation.

REGINA *v.* MAYOR OF SWANSEA, E. T. 1840. Q. B. 11 *Ad. & E.* 66.

The objections should be made before the council.

IT was alleged in answer to a rule for a mandamus to execute the compensation bond, that the statement of the profits made by the applicant under the 66th section did not shew the yearly amounts for five years next before the passing of the act, but only an average down to the end of 1834; and that the applicant had another person joined with him in the office who had made no claim—

But the Court held, that the above objections, though they might have afforded good grounds for opposing the claim, did not render it a nullity; and that consequently the council, not having taken any notice of it within the six months, were concluded. Any determination, however, by the council, whether well or ill founded, will prevent the operation of this proviso.

III. RELATIVE TO THE OFFICERS CONNECTED WITH.

(*a*) BEFORE 5 & 6 WILL. 4, C. 76.

1. *As to Aldermen.*

REX *v.* TIZZARD, E. T. 1829. K. B. 9 *B. & C.* 418.

The offices of alderman and common clerk are incompatible.

ON a quo warranto, it appeared, that in the borough of W. the town-clerk is appointed by the mayor, aldermen, and bailiffs, to hold the office during their pleasure, with a salary which they have power to alter in amount or withdraw altogether; and one of the town-clerk's duties is to attend all corporate meetings of the mayor, aldermen, bailiffs, and burgesses, and draw up minutes of their proceedings under their inspection. The town-clerk having been duly appointed and served the office of mayor thereby became an alderman.

Per Cur.—We are of opinion, that the two offices are incompatible where the holder cannot in every instance discharge the duties of each. Now, in two questions of amotion and salary, the town-clerk is not competent to discharge the duty of an alderman. The acceptance of the second office therefore vacates the first.

JONES *v.* WILLIAMS, H. T. 1825. K. B. 3 *B. & C.* 762; S. C. 5 *D. & R.* 654; S. C. 1 *C. & P.* 459, 669.

Where a charter provides that aldermen shall be justices of the peace within a borough, where the aldermen may appoint deputies, the latter cannot be justices of the peace.

A CHARTER authorized the aldermen, bailiff, and capital burgesses, to elect two out of the burgesses of the borough to be aldermen for the year ensuing, who might execute by themselves, or their deputies, the offices of aldermen of the borough; and also, that, in case of the death or displacing of any of the aldermen for the time being, another might be elected for the remainder of the year; and there was also a proviso, that, in the absence of any of the former aldermen, they might elect one or more of the burgesses, according to the necessities of the borough, but, as to the last-mentioned aldermen, the charter was silent as to deputies. The charter further provided, that aldermen for the time being should be justices of the peace within the borough.

The Court held, that as the 27 Hen. 8, c. 24, s. 2, has superseded the power in a subject of delegating the authority of a justice of the peace, and confined it to the King; and as the charter contemplated two classes of aldermen, and would be fully satisfied by holding that an alderman had a right only to appoint a deputy to execute all his corporate powers; that such deputies were not justices, and consequently not entitled to exercise the functions of magistrates.

---

2. *As to Articled Clerks being Burgesses.*

REX *v.* MAYOR OF DONCASTER, H. T. 1828. K. B. 7 *B. & C.* 630; S. C. 1 *M. & Ry.* 545.

An articled clerk is not an apprentice to a trade, so as to be admitted a free burgess.

BY custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess carrying on trade there, were entitled to be admitted to the office of free burgess. On motion for a mandamus, it appeared that the applicant had been bound by an indenture of apprenticeship, or articles of clerkship, to be the apprentice or clerk of an attorney, (who was a freeman, or free burgess of the borough, residing within the same), for seven years, to learn the business of an attorney, and that he served such attorney for that period within the borough.

Per Cur.—We are of opinion, first, that an articled clerk to an attorney was not an apprentice within the ordinary meaning of that term; and secondly, that at all events the occupation of an attorney was a profession and not a trade, and, consequently, that the party had no right to be admitted to his freedom.

---

3. *As to Sheriffs.*

REX *v.* GRANT, M. T. 1830. K. B. 1 *B. & Ad.* 104.

A custom to elect a sheriff who was a freeman of the corporation is good.

A CHARTER creating sheriffs directed the voters and commonalty every year to elect "de seipsis," and the usage had always been to elect from amongst the freemen, but a later charter confirming the former privileges omitted those words.

The Court held, that the election of a person not a freeman was bad.

4. *Of removing Officers.*

REX *v.* HARRIS, E. T. 1831. K. B. 1 *B. & Ad.* 936.

If a meeting be held by adjournment, a corporate officer may be removed without new notice to the burgesses.

A. HAVING the office of town-clerk of a borough, to hold and exercise for life by himself or his sufficient deputy, appointed a deputy in 1823. A bill of indictment having been found against A. for forgery, he in April, 1829, quitted the country. The deputy died on the 23rd of April, 1830. At a meeting of the corporation held on the 31st of May, 1830, by adjournment from the 27th of April, one of the grand common-days, it was resolved to remove A. from office, on the ground that he had neglected to attend by himself or deputy at that adjourned meeting and at other meetings of the corporation.

The Court held, 1st, that no previous notice to the members of the corporation of the purposes of the meeting was necessary, inasmuch as it was held by adjournment from one of the grand common-days, when every member of the corporation is supposed to be present; and, 2ndly, that A. was properly removed from his office, inasmuch as under the circumstances he must be presumed to have left the country without any intention to return, and therefore on the death of his deputy there was no person capable of executing the office.

(*b*) SINCE THE 5 & 6 WILL. 4, C. 76.

1. *As to the Crier.*

BAYLIS *v.* STRICKLAND, T. T. 1840. C. P. 1 *Scott, N. S.* 540; S. C. 1 *M. & G.* 591.

Where the crier is removed under the 5 & 6 Will. 4, justices may commit him if he refuses to give up the bell.

THREE magistrates, under the 60th and 65th sections of the 5 & 6 Will. 4, c. 76, convicted the late town-crier of the borough of E. of refusing to deliver up to his successor a bell, which was stated in the conviction to have been lately used by him in his office, and to be the property of the council of the borough, and adjudged him to be imprisoned until he should deliver up the bell, or give satisfaction to the town-clerk in respect of it.

The Court held, that the magistrates had jurisdiction to convict under the act, and that there being nothing in the conviction itself to render it void, trespass would not lie against them.

---

2. *As to Sheriffs.*

GRAINGER *v.* TAUNTON, T. T. 1836. C. P. 5 *D. P. C.* 190; S. C. 3 *Bing. N. S.* 64; S. C. 3 *Scott,* 393.

An officer of a corporation acted as sheriff before 5 & 6 Will. 4*,

IN this case a writ of ca. sa. had been directed for execution to the sheriffs of the city of Oxford, who had been elected under the 61st section of the 5 & 6 Will. 4, c. 76, (the Municipal Corporation Act). No notice having been taken of the writ, according to

* C. 76, s. 61, enacts, "That in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester,

its exigency, by the officers to whom it was directed, a rule was obtained calling upon them to return the writ.

though really no sheriff:—Held, that the right of such an officer did not supersede the right of the sheriff of the county.

Per Cur.—The clause deals with cities, some of which, before the enactment, had sheriffs, whilst others had none; and it enacts, "That in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester, Coventry, &c., and in the counties of the towns of Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, &c., the council shall, on the 1st of November in every year, appoint a fit and proper person to execute the office of sheriff." Now, before the act, officers in cities had duties to perform, some of which were analogous to those which were performed by sheriffs. The clause then goes on to say, that the person so elected "shall have the like duties and powers as the sheriff, or other person filling the office of sheriff, in the said town and counties respectively would have had, if this act had not passed." Now, in this case, it appears, that the city of Oxford had not sheriffs as public officers, prior to the enactment; but there were there two persons, bailiffs, who, as public officers, performed certain duties, analogous to some of those performed by sheriffs; but, amongst the duties which those bailiffs performed, that of receiving and returning writs from the superior courts of Westminster was not one; and, in our opinion, it was intended that the words of the clause, upon which this discussion arises, should be confined and limited to those cities which had sheriffs before the enactment, and should not be extended to those which had not. We therefore think we have no right to call upon the sheriffs of Oxford to return this writ, nor had we a right to address it to them; besides, we cannot help thinking, that if it had been the intention of the legislature, in this particular instance, to effect so great a change in respect of a county as to deprive that county of the sheriff, they (the legislature) would have introduced a few words upon the subject into the enactment.

(*c*) As to the election.

1. *Before 5 & 6 Will. 4, c. 76.*

1.—*Of the Candidate.*

REX *v.* SAWYER, H. T. 1830. K. B. 10 *B. & C.* 486.

A charter, that no mayor shall be re-elected within three years, means

A CHARTER creating a corporation provided for electing a mayor on the Monday before Michaelmas-day, and for the swearing him in on the Friday after Michaelmas-day, in every year. A subsequent clause declared that no person who had served the office of

Coventry, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, and York, and in the counties of the towns of Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council shall, upon the 1st day of November in every year, appoint a fit person to execute the office of sheriff, with the like duties and powers as the sheriff, or the person filling the office of sheriff in the said towns and counties respectively would have had if this act had not passed; and every person who, at the time of passing this act, shall hold the office or execute the duties of sheriff in the said towns and counties respectively, shall continue to hold and execute the same until the first appointment of a sheriff therein under the provisions of this act, and no longer."

the charter year and not a calendar year.

mayor should be capable to be re-elected until the space of three years next ensuing the end and determination of his office of mayor. A person who held the office of mayor was, three years afterwards, re-elected; but, if the computation of the calendar was to be taken, three years had not intervened; for he had gone out of office on the 6th of October, 1826, was re-elected on the 28th of September, 1829, and on the 2nd of October, in that year, sworn in. If the computation was to be taken according to years of office, then, according to the charter, three years had intervened.

The Court held, that the latter was the proper mode of computation; and that he was well elected.

2.—*As to the mode of Election.*

REX *v.* PULSFORD, T. T. 1828. K. B. 8 *B. & C.* 350.

On an election of a corporate officer, the notice need not specify the purpose for which the members (when a select body) are to attend.

IT appeared that the election of a capital burgess was to be made, not by the corporate body at large, but by the mayor and common council. The meeting at which the defendant was elected had been convened by a written notice sent by the town-clerk to the members of the common council in the following form:—

"City of Wells.

"Sir,—You are requested to attend a meeting of the corporation, on the day of , 18 , at o'clock, in the noon.

"By order of the Mayor,

"Town Clerk."

The early practice in the borough was to give only a verbal notice of such corporate meetings; and it had not been usual, even recently, to give written notices; and there was no instance of such a notice being given which expressed the purpose for which the announced meeting was called.

The Court held—first, where the right of election is not in the members of the corporation at large, but in a select body, a notice given to the members of that body calling a corporate meeting, need not express the purpose for which the meeting is called; secondly, but where the right of election is in the members of the corporation at large, such a notice should express the purpose for which the meeting is called.

REX *v.* SALWAY, E. T. 1829. K. B. 9 *B. & C.* 424.

A usage as to the elections of officers repugnant to the charter cannot be supported.

A CHARTER temp. Eliz. gave powers to elect to vacant offices from one or more of the "burgesses and inhabitants."

The Court held, that a usage subsequent to the charter to elect burgesses, not being inhabitants, being repugnant to the charter, could not, after the acceptance of the charter, be supported by antecedent usage, and the charter having, after a surrender, been restored by an instrument granting to the corporation that they should enjoy all franchises, &c., which they had previously enjoyed, by virtue or pretence of any charter, or by any other lawful manner, right, or title:—Held, that such instrument only restored such rights as had been lawfully exercised, and consistently with that charter.

REX *v.* BUMSTEAD, T. T. 1831. K. B. 2 *B. & Ad.* 699.

As the election must be in accordance with the charter, a bye-law extending the number of persons eligible is bad.

BY charter, August, 1670, the patten-makers of London and Westminster, and within ten miles thereof, were made a corporation, having a master, two wardens, and twelve assistants, and the company were yearly to elect one of the two wardens to be master. There was a power to the master, wardens, and assistants to fill up any vacancy which might occur among the master and wardens by reason of death or removal between the annual days of election. By a bye-law made in 1673, and agreed to by the whole company, the master was from thenceforth to be elected by the master, wardens, and assistants in a particular mode, not given by the charter, out of two or three meet and sufficient persons, by the master, wardens, and assistants, and selected by the master and wardens. In case of an equality of votes, the master was to have the casting vote. The election of master had continued under this bye-law clause to 1831, when the defendant was elected under it; he was not a warden at the time.

Per Cur.—This bye-law cannot be maintained. This is not a case where the corporation at large have, by a bye-law, merely delegated the power of election which they possessed before to a select body; inasmuch as here, by the charter, the master is to be elected from particular persons—viz. the two wardens; but by the bye-law he may be elected from among other persons—viz. the master and assistants. If such a bye-law were good, the charter might be wholly defeated. We think, also, that that part of the bye-law which regulates the election is void, because the right to elect is thereby delegated to the select body, on condition that they elect in a certain mode, which is not directed or sanctioned by the charter. The select body, therefore, have not the power which was given by the charter to the corporation at large.

REX *v.* GOLDSMITH, T. T. 1833. K. B. 4 *B. & Ad.* 835.

In a subsequent case, it was held, that the charter may be varied by usage.

BY charter of Car. 2, there were to be in the borough of S. a mayor, aldermen, and twenty-four capital burgesses; on the death or removal of an alderman, the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place; when a capital burgess died, &c., the mayor, aldermen, and capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day "by the burgesses of the said borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants, to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter-day, in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended.

The Court held, that this did not avoid the election; for that the word "burgesses," in the charter, (where it treated of the election of the mayor), could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of

capital burgesses by the mere forbearance of the other burgesses to interfere, and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely.

REX *v.* DUKE OF BEAUFORT, M. T. 1833. K. B. 2 *N. & M.* 815; S. C. 5 *B. & Ad.* 442.

By custom, the jurors of a court-leet may elect the corporate officers.

IN pleading, it was averred, as an immemorial custom, that the jury of the court-leet holden for the borough and manor of L., exercised and had the right of presenting persons to be admitted burgesses of the borough, and that persons so presented had a right to be admitted burgesses. After verdict, finding the custom to be as averred, it was objected, that the custom was bad, inasmuch as it did not appear that the manor and borough were co-extensive, and the jury presenting might therefore be strangers to the corporation.

But the Court held the custom as found to be sufficient.

REX *v.* WESTWOOD, M. T. 1825. K. B. 4 *B. & C.* 781; S. C. 6 *D. & R.* 257.

And the right of election of officers may, by a bye-law, be limited to a select body.

THE corporation consisted of mayor, bailiffs, aldermen, and burgesses, of which the bailiffs and aldermen were chosen out of the burgesses, and formed a common council; and the corporation at large made a bye-law vesting the right of electing burgesses in the mayor and common council, the charter giving power to the mayor and burgesses to elect burgesses:—

Held, (*per Holroyd* and *Littledale*, Js., *Bayley*, J. diss., and *Abbott*, C. J., dub.), that such bye-law was not inconsistent with the power given by the charter, the burgesses being represented, though in a small degree, by the aldermen, who continued to be burgesses.

REX *v.* ATTWOOD, H. T. 1833. K. B. 1 *N. & M.* 286; S. C. 4 *B. & Ad.* 481.

So, a bye-law, reducing the number of electors, is good; but not narrowing the number of persons eligible to serve.

BY charter of the 14 Richard 2, it was granted to the tailors and linen armourers to elect one master and four wardens from among themselves, so often as they should please, in manner as they should think best; by long usage (since 1488) the masters and wardens, and court of assistants, who were past masters, had been accustomed to elect the master; and it appeared from the records of the company, that the master had been generally elected from the court of assistants; but there had been instances of his being elected from the liverymen of the fraternity.

The Court held, that the only ground upon which the Court would have granted a quo warranto would have been upon the question, whether the usage limited the number of the persons eligible, by confining the right to the court of assistants; but that there was not necessarily an inference, that two parts of the usage were one entire usage; and, therefore, that there was not sufficient doubt to induce the Court to grant the rule. A bye-law restraining the right of election to a select body is good, but if it limit the number of those who are eligible to an office it is bad.

REX *v.* HEADLEY, M. T. 1827. K. B. 7 *B. & C.* 496; S. C. 1 *M. & Ry.* 345.

Where the election is to be by the burgesses, or the greater part of them, a majority is sufficient.

A CHARTER directed, that the mayor, recorder, and thirty-six chief burgesses, being the common council of the borough, (some of which chief burgesses were called or distinguished by the name or title of chief burgesses, councillors), or the greater part of them, should assemble and elect a mayor from the chief burgesses, councillors, and also conferred other powers and qualifications upon the chief burgesses, councillors, independent of the other chief burgesses; but granted "that the mayor, recorder, and aforesaid chief burgesses of the common council, or the greater part of them," might elect to the office of chief burgess.

The Court held, that an election of chief burgess did not require the concurrence of a majority of the chief burgesses, councillors, as well as of the chief burgesses, not councillors, but that a majority of the whole body, namely, nineteen chief burgesses, was sufficient. Where a charter has conferred the right of election upon the majority of an assembly, consisting of several definite bodies, or the greater part of them, a majority of the members of each of those definite bodies is necessary to make a valid election. But if one of those definite bodies be, for other purposes, subdivided into integral parts, under distinct titles, it will not be requisite that, in such election, there shall be a majority of the members of each integral part.

See R. v. *Miller*, 6 *T. R.* 268; *R.* v. *Bellringer*, 4 *T. R.* 810; *and R.* v. *Bower*, 1 *B. & C.* 492.

REX *v.* GREET, T. T. 1828. K. B. 8 *B. & C.* 363.

Where the right of election is vested in the majority of a mayor, four jurats, and two bailiffs, it means a majority of the entire number, and therefore may be exercised if some be dead.

A CORPORATION was composed of a mayor, four jurats, and two bailiffs, and by the charter upon any vacancy it should be lawful for the mayor and other the surviving and remaining jurats and bailiffs, "or the greater part of them," of whom the mayor was to be one, to elect one of the burgesses or inhabitants.

Held, that, as in the cases of the deaths of one bailiff or of two jurats, the ordinary rules of construction requiring a majority of each integral part to be present, would lead to an absurdity if not impossibility, the Court would give it a consistent and uniform construction, by holding that an election might well be made by a majority of the entire number of the mayor, jurats, and bailiffs.

REX *v.* MAY, T. T. 1833. K. B. 4 *B. & Ad.* 843.

But, in a subsequent case, it was held, there must be a majority of each class.

IT was granted by charter that a corporation should have so many aldermen and so many capital burgesses, and that when one of the latter should die, depart, or be removed, another should be elected in his place by "the mayor and aldermen, and other capital burgesses then surviving or remaining, or the greater part of them."

The Court held the election must be made by a majority of the full members of aldermen and of capital burgesses; a mere majority of the members of both bodies who happen to survive is not sufficient.

REX *v.* ROBERTS, T. T. 1835. K. B. 5 *N. & M.* 130.

If an oath of office is to be taken under charter, it must be taken again if the charter be continued by letters patent.

To an information in quo warranto, the defendant pleaded that King Edward I. incorporated the borough of Carnarvon, and granted that the constable should be mayor, and that he should be sworn first to the king and then to the burgesses; that George III. in 1812 appointed the Marquis of Anglesea constable, to exercise the office by himself or his deputy, and that he took the oaths. It then alleged that he continued in the office, notwithstanding the several demises of George III. and George IV. until the 10th of January, 1831, when William IV. by letters patent continued and appointed him to the office. The fourth replication alleged that the marquis did not take the oath after the granting of the letters patent by William IV., and before the defendant exercised the office of mayor. On demurrer—

The Court held, the letters patent of William IV. were a new grant of the office, and not merely a confirmation of the old appointment, and that it was necessary that the marquis should have been sworn under the new appointment before he could exercise the office.

3.—*As to invalid Elections.*

REX *v.* HUGHES, T. T. 1826. K. B. 5 *B. & C.* 886; S. C. 8 *D. & R.* 708.

If a burgess be unduly elected an alderman, and ousted as such, he is not remitted to the character of burgess.

TWO of the aldermen voting in the election of mayor had themselves been unduly made aldermen, and two other persons been elected burgesses in their place, in which they had concurred.

The Court held, that upon being ousted from the office of aldermen they were not remitted to their former character of burgesses; the acceptance of an office incompatible with another being virtually a surrender of the latter; that their votes in the election of mayor could not be considered to have been given in the character of burgesses, and the election therefore was void for want of a proper majority concurring in it.

REX *v.* HUGHES, T. T. 1825. K. B. 4 *B. & C.* 368; S. C. 6 *D. & R.* 443.

To a plea that an officer was elected according to the charter, the replication should be that he was "not duly elected."

THE defendant pleaded that he was elected to the office according to the provisions of the governing charter, and the prosecutor pleaded that, at such election, fifty votes, (naming them), tendered for another candidate were improperly rejected, and thirty-eight tendered for the defendant were improperly admitted.

The Court held, that, as the replication non debito modo electus was the only issue proper to be taken, and would have raised every question competent to the prosecutor upon that record, that the replications were bad, as stating a number of facts from whence the conclusion, "not duly elected," was to be drawn, being only an argumentative and not a direct denial of the validity of the election. Held also, that the title of electors, being corporators de facto, cannot be entered into in questioning that of the elected.

REX *v.* ROLFE, E. T. 1833. K. B. 1 *N. & M.* 773; S. C. 4 *B. & Ad.* 840.

ON a motion for a quo warranto information an affidavit stated the relator's information and belief that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid a proper number of electors present, it was sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that Court.

There cannot be a denial of the day of election.

The Court said, the days assigned by the relator are material; and he cannot allege that whenever the party was elected he was not duly elected; where the party shews that on the days mentioned there was a proper number of electors present, it is sufficient, although the election may not have taken place on those days, and he need not go on to shew what took place on other days.

4.—Of the Admission,

REX *v.* MAYOR, &c. OF LONDON, E. T. 1833. K. B. 3 *B. & Ad.* 255; S. C. 2 *N. & M.* 126; S. C. contra, 9 *B. & C.* 1; S. C. 4 *M. & R.* 36.

TO a mandamus to the lord mayor and aldermen of London to admit and swear in A. B. to the office of alderman, they returned that the court of mayor and aldermen had from time immemorial the authority of examining and determining whether or not any person returned to them by that court of wardmote as an alderman was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman that he should be a fit and proper person to support the dignity and discharge the duties of the office. That A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and having heard witnesses, did adjudge according to their discretion and sound consciences that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office.

The mayor and aldermen of London may refuse to admit an alderman without assigning reasons.

The Court held, first, that the custom set out in the return was good and valid in the law; secondly, that as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons.

2. *Since 5 & 6 Will. 4, c. 76.*

REGINA *v.* BRIGHTWELL, E. T. 1840. Q. B. 10 *A. & E.* 171; S. C. 2 *P. & D.* 413.

Under the 5 & 6 Will. 4, c. 76, an election of alderman by lists is good*;

ON an information, in the nature of a quo warranto, against the defendant, for exercising the office of alderman in the city of Norwich—

The Court held an election of aldermen by lists, there being no voting for them singulatim, but each elector having an opportunity of proposing and voting for his own candidate, and of objecting to any of the lists proposed, is valid under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

REGINA *v.* MAYOR OF LEEDS, H. T. 1838. Q. B. 3 *N. & P.* 145; S. C. 7 *A. & E.* 963.

but if two vacancies occur at the same time, voting for the two candidates jointly is bad.

PREVIOUS to the annual election of councillors, the mayor of a municipal borough published, with the approbation of the aldermen and assessors of the wards, a notice, stating that there were two vacancies in one of the wards, one being the general vacancy, the other a presumed extraordinary vacancy, directing the electors to elect two councillors, and pointing out the proper polling booths. The election proceeded accordingly, and two candidates had the majority of joint votes, but a third had the majority of single votes. There was, in fact, no extraordinary vacancy.

The Court held, that the election was not void, but the third candidate was duly elected.

REX *v.* MAYOR OF WINCHESTER, T. T. 1837. Q. B. 2 *N. & P.* 274; S. C. 7 *A. & E.* 215.

After declaration the assessor cannot declare others duly elected.

THE aldermen and assessors, who presided at an election of councillors for a ward in a municipal corporation, declared three persons to have been elected, and the mayor appointed a time for them to make the declaration required by the act, which they did. The assessors afterwards declared two other persons to have been elected.

The Court refused to grant a mandamus to the corporation to admit these two last, as the office was now full.

REX *v.* ARNOLD, H. T. 1836. K. B. 6 *N. & M.* 152.

The town-clerk is not bound to allow more than one burgess at a time to inspect the voting papers;

BY the 35th sect. of 5 & 6 Will. 4, c. 76, "the town-clerk shall permit any burgess to inspect the voting papers of any year, on payment of one shilling."

The Court held, that the town-clerk was not bound to give copies of, nor extracts from, the voting papers, to any burgess; nor was he compelled to hand to a burgess more than one paper at a time; nor that one to more than one burgess at a time; but he was bound to permit any one burgess to inspect any one paper at a time, and make what minutes and extracts he would wish.

* And now see 7 Will. 4 & 1 Vict. c. 78.

REGINA *v.* BOROUGH OF LEEDS, H. T. 1841. Q. B. 11 *A. & E.* 512.

P. HAD been elected by a majority to the office of town-councillor, and the mayor and assessors having examined the voting papers declared him elected within the time prescribed by 5 & 6 Will. 4, c. 6. s. 38. Afterwards having re-examined the voting papers, they made another declaration, not within the time prescribed, that R. was duly elected.

Lord *Denman*, C. J.—We are of opinion, that the proceeding of the mayor in this instance was taken when he had lost all authority, and was a nullity; and consequently a mandamus will go to admit P.

and where a corporate officer is published duly elected, not before the time for making such declaration, it is too late afterwards to controvert the election.

REGINA *v.* LEDGARD, E. T. 1838. Q. B. 3 *N. & P.* 513.

Per Cur.—IN the election of town-councillors, under 5 & 6 Will. 4, c. 76, the returning officer's duty is only ministerial, to return the candidate who has the actual majority, and the elector must take it upon himself to decide whether the candidate for whom he votes is properly qualified or not; the voting papers are the proper evidence of the election, although not the record of it.

Under the 5 & 6 Will. 4, c. 76, the returning officer's duty is strictly mentioned, that is, to return the candidate who has the actual majority. He cannot inquire into the votes.

REGINA *v.* RICKETTS, H. T. 1838. Q. B. 3 *N. & P.* 151.

A PARTY, being a councillor of a municipal corporation, neglected to pay his rates, and was omitted from the burgess list.

Lord *Denman*, C. J.—I take the well-established practice to be, that, when an office is full de facto, the presiding officer has no authority to proceed to a new election, until there has been a judgment of ouster in a quo warranto. Four cases are expressly provided for by the 52nd sect., in which the election may be declared void by the council, and a new election may take place. But no power is given to the alderman of the ward to proceed to a new election in such a case as the present. He has no means of learning the fact of the vacancy; papers or certificates may be brought to him, which may or may not be true, but which he cannot determine. He is not therefore bound to act as he is now called upon. This is an inconvenience that has always existed from the date of corporation law.

Where the omission of a councillor's name from the burgess roll compels a new election, a quo warranto must previously issue.

REGINA *v.* HUMPHREY, T. T. 1838. Q. B. 10 *A. & E.* 335; S. C. 3 *N. & P.* 681.

QUO warranto information against the defendant for exercising the office of alderman of the ward of Aldgate in the city of London.

Per Cur.—The question is, whether the office was full at the time when the defendant was elected; and that depends upon this, whether the court of aldermen had a right to call upon Mr. Salomons to make the declaration before they admitted him to the office. On referring to the stat. 9 Geo. 4, c. 17, we find, that, as that declaration is not to be made upon admission to the office, and before the party is in it, the court of aldermen ought to have admitted him in the first place, and ought not to have declared the office void, at least before Mr. Salomons had refused to make the declaration after his admission.

Under the words of the 9 Geo. 4, c. 17, the oath may be made after admission.

IV. RELATIVE TO THE DUTIES OF.

(*a*) Before 5 & 6 Will. 4, c. 76.

Dunstan *v.* Imperial Gas Company, M. T. 1831. K. B. *3 M. & Ad.* 125.

A resolution by a trading corporation, not under seal, is not binding.

This was an action of debt to recover from the defendants certain fees due to the plaintiff, as one of the directors of the company, for his labour, care, diligence, and attendance, in attending divers weekly and other courts, committees, &c. By the 1 & 2 Geo. 4, c. 117, (local and personal act), the defendants were created a corporation, with all the rights and privileges of such. By the 52nd section certain persons are to be appointed to transact the business of the company; amongst others, eighteen directors, three auditors, and a clerk. Persons are not qualified to be directors, unless they have a certain number of shares. The auditors likewise are to have a certain number. To be clerk requires no qualification. By the 76th sect. the company have power to make bye-laws. By the 60th sect. the court of proprietors are to make rules and regulations. The court of proprietors, at a general meeting, on the 15th of August, 1822, made a resolution containing, amongst other things, the following:—"Resolved, that there be allowed to every director, for every attendance at the court of directors, two guineas," &c.

Per Cur.—The act appoints a certain number of directors, and some of the duties to be performed by them are pointed out by the act; and the powers given to them are as unlike powers given to servants as possible. The act is silent as to remuneration; and we do not see how, in point of law, they can be entitled to any, except it be given to them by a bye-law, or contract of the whole corporation, under their common seal. The resolution in question was not made under the common seal of the corporation; and we are of opinion, that the directors cannot by law claim the compensation voted to them by that resolution.

(*b*) Since the 5 & 6 Will. 4, c. 76.

Regina *v.* Mayor of Evesham, E. T. 1837. Q. B. *3 N. & P.* 351; S. C. 8 *A. & E.* 266.

Under 5 & 6 Will. 4, c. 76, the minutes of the proceedings of the council must be signed by the chairman at the time.

By 5 & 6 Will. 4, c. 74, s. 69, it is enacted, "That all acts whatsoever authorized or required by virtue of this act to be done by the council of such borough, and all questions of adjournment or others that may come before such council, may be done and decided by the majority of the members of the council who shall be present at any meeting held in pursuance of this act, the whole number present at such meeting not being less than one-third part of the number of the whole council; and at all such meetings the mayor, if present, shall preside; and the mayor, or in the absence of the mayor, such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then assembled shall choose to be the chairman of that meeting, shall have a second or casting vote, in all cases of equality of votes; and minutes of the proceedings of all such meetings shall be drawn up and fairly entered into a book to be kept for that purpose, and shall be signed by the mayor, alder-

man, or councillor presiding at such meeting." The chairman had taken away the notes or minutes of the business down to his own house; and, having revised them, had caused a fair copy to be delivered to the town-clerk on the day after the meeting.

The Court held that these minutes should be entered at the meeting, and signed by the chairman at that time. Mr. Justice *Patteson* observed, "that perhaps, if the town-clerk had drawn up the minutes and had them signed after the meeting, we might not say that the thing was incorrect when so done."

REGINA *v.* BIRMINGHAM AND GLOUCESTER RAILWAY, 1840. N. P. 9 *C. & P.* 469.

ON an indictment against the company for disobeying an order of justices, which had been confirmed at the quarter sessions, for constructing a bridge over a road—

A corporation aggregate cannot appear in person, but must appear by attorney.

Per Parke, B.—There are instances of corporations aggregate being indicted for non-repair of bridges and roads ratione tenuræ. The only difficulty is as to how they are to appear. If the indictment were in the Court of Queen's Bench, they would appear by attorney; but the question is, whether they can appear by attorney here. At present, I see no other way than by removing the indictment by certiorari, and the company pleading in the Court of Queen's Bench by attorney.

HIPKINS *v.* CORPORATION OF SWANSEA, T. T. 1838. Ex. 4 *M. & W.* 640.

THE declaration in debt stated that certain lands were in 1762 inclosed by act of Parliament, reciting the fee-simple to be in B., and that the mayor and burgesses of S. were entitled to the right of pasturage; and it directed that —— acres should be allotted to the corporation, who might, in common hall assembled, grant such leases as should be thought reasonable; and that they did, by a bye-law, direct that parcels of the land should be leased to the burgesses at certain rents, out of which certain annual payments should be made to the twelve senior burgesses, (but that no benefit should ensue to any lessee), and the remainder to the benefit of the corporate body; and that such burgesses should receive their portions, to be paid by the common attorney of the borough (an office extinguished at the passing of the Municipal Act). The plea alleged that the defendants had applied all the rents of the lands in question, and of others, in payment of debts due and owing from the corporation, and payable in priority and preference to the payments due to the burgesses. On special demurrer—

Under the 5 & 6 Will. 4, the corporate funds can only be applied to the payment of the interest charged on the corporate property.

The Court held the plea bad, for not stating that the payments by the corporation were made for antecedent debts; and that upon the true construction of the Municipal Act the corporation had no right, in priority to the claims of the corporators, to pay any thing more than the interest of the debts charged on the corporate property.

V. RELATIVE TO THE PRIVILEGES OF, SINCE 5 & 6 WILL. 4, c. 76.

BIGNOLD *v.* SPRINGFIELD, T. T. 1839. C. P. 5 *Bing. N. S.* 745; S. C. 8 *Scott*, 101.

The privileges of the parties described in the 5 & 6 Will. 4, c. 76, as to the administration of charity estates, ceased after the 1st August, 1836.

BY 5 & 6 Will. 4, c. 76, s. 71, it is provided, that if any vacancy shall be occasioned among the charitable trustees for any borough before the first day of August in the year 1836, it shall be lawful for the Lord High Chancellor, or lords commissioners of the great seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee: Provided also, that if Parliament shall not otherwise direct, on or before the said first day of August 1836, the Lord High Chancellor or lords commissioners of the great seal shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates. Upon appeal in Dom. Proc., and the opinion of the Judges taken:—Held, that the administration of charity estates and funds comprised in and described by sect. 71 of 5 & 6 Will. 4, c. 76, did not continue, after the 1st of August, 1836, in the persons described in that section, no subsequent act having passed respecting the same before that day, and no vacancy having been occasioned amongst such persons before that time; and that the Lord Chancellor had authority to make order for the appointment of new trustees.

VI. RELATIVE TO THE RIGHTS OF*, AND LIABILITIES OF†.

(*a*) IN GENERAL, BEFORE 5 & 6 WILL. 4, c. 76.

BEILBY *v.* RAPER, E. T. 1833. K. B. 3 *B. & Ad.* 284.

The corporation of the Trinity House of Hull had power to license pilots, &c., but only occasion-

A CHARTER gave the corporation of the Trinity House of H. jurisdiction as to port-duties and pilots in all havens, creeks, and other places "where our customer of H., by virtue of his office, hath any authority to take any custom," &c. Those limits extended up a river beyond G., a newly erected port, and beyond which the corporation had occasionally exercised the powers given by the charter.

* Where, the corporation having a prescriptive right to tolls, by a charter of Elizabeth all the ancient rights were confirmed, but exempting the inhabitants from toll in all places except London:—Held, that, as such exemption led to no inference that the inhabitants were to be exempted from necessary charges of their own town, to which the tolls were applicable, the exemption therefrom applied to the tolls of all other places, (except London), but not to the tolls of their own town. (*Rex* v. *Mayor of Truro*, M. T. 1831, 8 Bing. 275; S. C. 6 M. & P. 270; abridged, post, tit. *Tolls*).

† If the mayor of a town order weights and measures, and when supplied they be examined at a full meeting of the corporation, this is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact that the mayor was afterwards ousted from his office by a judgment from the Court of King's Bench makes no difference. (*De Grave* v. *Corporation of Monmouth*, M. T. 1830, N. P., 4 C. & P. 111).

The Court held, that the power of licensing pilots in all places where the customer of H. might take custom was not limited to the jurisdiction of the custom for the time being, but that they might still license in respect of G., although recently made an independent port as to customs: and that the forbearance by the corporation to license to the full extent of their limits, whilst no necessity required it, did not affect their right to do so when it became necessary; and further, that they might license for limited extents within their jurisdiction. Held, also, that under sect. 6 of the General Pilot Act, 6 Geo. 4, c. 125, the power for the Trinity House of H. to appoint sub-commissioners to *examine* and license pilots is permissive only, and not imperative.

ally exercised that power to the full extent: —Held, that it did not affect their right, when it became necessary.

CLARKE *v.* THE IMPERIAL GAS COMPANY, M. T. 1832. K. B. 1 *N. & M.* 206; S. C. 4 *B. & Ad.* 315.

THE managing directors of an incorporated company had by deed, under the corporate seal, granted a retiring pension or annuity to an officer, (who covenanted therein not to transfer his services to any other company), according to resolutions made at meetings of the proprietors, pursuant to the recommendation of a committee appointed to inquire into the accounts and duties of officers of the company. Upon a special case—

The Court held, that the seal having been affixed by those who had the legal custody of it, the deed was not void, as not having been executed in conformity with the act of Parliament; and that the purpose of such grant was not unlawful, but within the general authority of the directors in managing the affairs of the company; and lastly, that no irregularity appearing in the proceedings set out for convening the proprietors for the particular object, the Court would presume their consent, and that proceedings might have been had, though not set out in the case, which would have shewn a strict compliance with the terms of the act.

The managing directors of a trading corporation may by deed under seal grant a pension to a retiring servant;

SMITH *v.* BIRMINGHAM GAS COMPANY, T. T. 1834. K. B. 3 *N. & M.* 771; S. C. 1 *A. & E.* 526.

IN an action for a wrongful distress, it appeared that the distress was made by an agent of the company, who was appointed by parol, and not under seal, when it was objected that he had not sufficient authority from the company to render them liable to an action in tort; but *Tindal*, C. J., thought, that at common law a corporation could appoint a bailiff, for the purpose of making a distress, by parol, and refused to nonsuit, reserving leave at the same time to the defendants to enter a nonsuit. On motion for a nonsuit—

Per Cur.—The case resolves itself into this question, whether the company, being a corporation, could be made liable for a wrongful distress by an agent not appointed under seal. *Cary* v. *Mathews*, cited in *Cook* v. *Butler*, (Salk. 191), and the *Anonymous case* in Salkeld, 191, are authorities to shew that an appointment by deed was necessary. But in the present case the act of incorporation does not seem to contemplate its being given by deed. This is a case of that kind, which does not require that it should be an appointment by deed.

and the clerk of a corporation may distrain without an authority under seal, unless the statute of incorporation enacts that the warrant of distress shall be by deed.

REX *v.* MERCHANT TAILORS' COMPANY, T. T. 1832. K. B. 2 *B. & Ad.* 115.

The members of a corporation have no right to inspect the charter, books, &c., upon a mere suggestion of abuse of management.

MEMBERS of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances, not affecting the parties themselves or any matter then in dispute, applied for a mandamus to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens belonging to the company, or relating to its affairs.

The Court discharged the rule with costs.

(*b*) TO MAKE BYE-LAWS.

1. *Before* 5 *&* 6 *Will.* 4, *c.* 76.

CHAMBERLAIN OF LONDON *v.* COMPTON, M. T. 1825. K. B. 7 *D. & R.* 597.

The power to make bye-laws does not sanction bye-laws in restraint of trade.

THIS was an action of debt to recover a penalty of 5*l.* under a bye-law of the Pewterers' Company. The defendant removed it by habeas corpus cum causâ into the court of Queen's Bench. The return to the writ stated, first, that London, from time immemorial, was an ancient city; and next, the custom for the lord mayor, aldermen, and common council, to make bye-laws for the common good of the citizens and others relating thereto, so as the same should be consonant to good faith and reason, in nowise prejudicial to the king or his people, nor in any manner repugnant or contrary to the laws and statutes of England. It then went on to state a bye-law, duly made in July, 1774, for the regulation of the Pewterers' Company. This bye-law recites, that the Pewterers' Company had been incorporated by divers ancient charters; that, by an act of Parliament, 4 Hen. 8, a power was given to the company to search for all deceivable metal, or workmanship of tin or pewter, within the city of London and the suburbs, wheresoever it should be made, cast, or wrought; and the act declared all such metal and workmanship to be forfeited, if offered for sale. The act of Parliament also provided a standard of fineness, and forbade the manufacture by any other—referring the standard to the manufacture in the city of London. The act further went on to forbid the making of certain vessels of pewter, called ley metal, except after the size of the same metal wrought within the city of London. The bye-law then further recited, that the standard assays of pewter metal, according to the perfect goodness of the city of London, were kept at the hall of the Pewterers' Company in London, and no where else; and that the several sorts of pewter wares made and sold by themselves of the said company, were viewed, tried, and assayed by the company four times a year, or oftener. It then proceeded partly to recite and partly to reason. It stated, that, for the reasons aforesaid, all persons using the trade of a pewterer, within the city of London, ought to be of the company of pewterers; and that it had never been known that any person had followed the trade within the city, unless he was a member of the company, until of late one or more person or persons, being a freeman or freemen of London, had exercised and carried on the same, and bound apprentices, whereby such apprentices might be-

come free of other companies, though entitled to carry on the business of a pewterer by such servitude; by means whereof the trade carried on by such person or persons would not be so immediately under the care and inspection of the company, nor would the company be so able to rectify any abuses or frauds committed in the workmanship of pewter metal made and sold by such persons, as if they were members of the company; that, as a consequence, by the defect of those persons' workmanship, the trade might be hurt, the public deceived and imposed upon, and the company deprived of the benefits and advantages arising to them by bindings and fees, or making free, and be rendered less capable of introducing proper persons to constitute the livery of the company. Then this bye-law proceeded to enact that all persons, not being already free of the city, who should exercise the trade of a pewterer within it, by making pewter wares, or by uttering or exposing the same to sale as the maker, should be made free of the Pewterers' Company, and should not be admitted to the freedom of any other. It then enacted, that thereafter all persons, not already free of the city, and who then were, or thereafter should be entitled to the freedom of any other company by patrimony or service, and who ought, in pursuance of that bye-law, to be made free of the Pewterers' Company, should be made so, upon payment of the same fees as were payable upon the admission of the child or apprentice of the freemen of the company. It went on to impose a fine of 5*l.* on any person not already free of the city, and not admitted of the company, who should thereafter carry on the trade within the city, by making pewter wares, or by exposing the same to sale as the maker; the fine to be sued for by or in the name of the chamberlain, and when recovered, half to go to the person who should sue, and the other half to the treasurer of the London workhouse, towards the maintenance of the poor there.

The Court were of opinion, that the return was insufficient in not stating the general custom. Even in *Wagoner's case*, (8 Co. 129,) the bye-law recited the custom, though the return itself ought to have stated it. The act of Hen. 8 could not aid the return, as it did not prohibit any one from carrying on the trade. It only gave power to the company to search for base metals, and declared that such metal should be forfeited. The objection certainly did not affect the merits of the question, as the return was informal, though it might have been very long in use. To restrain a man's general liberty to carry on trade, a custom or an act of Parliament must be shewn; and neither one nor the other appeared by this return.

CLARK *v.* LE CREN, H. T. 1829. K. B. 9 *B. & C.* 52.

Hence, a bye-law, without a custom, that no painter shall exercise his trade in the city of London unless free of the Painters' Company, is bad.

THE Painters' Company in London made the following bye-law:— "That from and after the 29th of September, 1767, every person, not being already free of the city, who should exercise the art, trade, or mystery of painters within the city of London, or liberties thereof, should be made free of the said company; and that no person, then exercising, or who should thereafter exercise the said art or trade within the city or liberties, should, after the 29th of September, 1767, be admitted by the chamberlain into the freedom of the said city, of or in any other company than the said company, any law, usage, or custom of that city to the contrary thereof notwith-

standing. Provided always, that all and every person or persons, not being already free of the said city, and who then were, or thereafter should be entitled to the freedom of any other company within the city, by patrimony or service, and ought, in pursuance of the said act, to be made free of the said company of painters, should be admitted into the freedom of the said company, upon payment of such and the like fine and fees, and no more, as were then usually paid and payable upon the admission of the child or apprentice of a freeman of the same company."

Per Cur.—By the common law, any person may carry on any trade in any place, unless there be a custom to the contrary; and if there be such a custom, then a bye-law in restraint of trade warranted by such custom will be good; but if there be no such custom, a bye-law in restraint of trade will be bad. The effect of the bye-law in question is to prevent persons from carrying on trade; it operates, therefore, not merely to regulate, but to restrain trade. And, inasmuch as it does not appear that there is any special custom to warrant such a bye-law, it is void.

Rex *v.* Sheriff of York, T. T. 1832. K. B. 3 *B. & Ad.* 770.

But, a bye-law, limiting the number of attornies to practise in the sheriff's court, is good.

On a rule, calling upon the sheriff of the city of York, and prothonotary of the court of the said sheriff, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to admit Mr. William Smith, one of the attornies of the said court, and a freeman of the city, to practise as an attorney in the court of the said sheriff; it appeared, that the court in question was a court by prescription, held before the sheriff, but, in law, the court of the mayor and commonalty, which had the appointment of the officers by prescription; that the number of attornies entitled to practise in the court was limited, by a bye-law made in the reign of Philip and Mary, to four; which number was filled up.

The Court held, that an attorney of the superior courts at Westminster is not entitled as a matter of right to be admitted an attorney of a local court, in which the number of attornies has been by a bye-law, though not by immemorial usage, limited.

Shaw *v.* Pope, E. T. 1831. K. B. 2 *B. & Ad.* 465.

And the mayor and aldermen of London may limit the number of carts working for hire, to be used in the city of London.

The common council of the city of London have, by custom, a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they should be licensed. A bye-law was made in common council, that 420 of such carts, and no more, should, by the president and governor of Christ's Hospital, be allowed or licensed to work for hire within the city.

The Court held, that such bye-law was supported by the custom; and that the discretionary power of licensing ex necessitate was delegated by the common council to a smaller body; and (on motion for a procedendo, after a return to a habeas corpus, obtained by a party sued on the bye-law,) the Court refused to inquire whether or not the number of 420 was unreasonable.

See Cowp. 269; 1 *Lev.* 229.

DAVIES *v.* MORGAN, T. T. 1831. Ex. 1 *C. & J.* 587; S. C. 1 *Tyrw.* 457.

THE masters of a company, under a bye-law, issued to the wardens their warrant to distrain for a penalty. This warrant was put in as evidence by the plaintiff, (the party distrained upon), in an action for the seizure, to establish his case against the masters, as co-defendants with the wardens. The warrant recited a demand of the penalty previous to the seizure.

However a bye-law, authorizing a distress for a penalty, without a previous demand and refusal, is bad.

The Court held, 1st, that such demand was not established by the putting in of the warrant by the plaintiff, but that the defendants ought to have proved it. Held, 2ndly, that although a bye-law inflicting a penalty do not, in its terms, require that it shall be demanded previously to distress being made, yet such demand is necessarily to be implied, and must be proved. The practice on such bye-laws has accordingly been to aver a demand and refusal in the pleadings.

CARTER *v.* SANDERSON, T. T. 1828. C. P. 5 *Bing.* 79; S. C. 2 *M. & P.* 164.

A COMPANY was incorporated by letters-patent, and empowered to make bye-laws for the good order, rule, and government of the company. They accordingly made a bye-law, that the steward for the time being should on lord mayor's day provide a dinner for the livery of the company, (with such allowance of the company as they should think fit), or in default pay a fine of 20*l.*, or swear that he was not worth 300*l.* This was an action of debt by the master and wardens of the Coopers' Company against one of the stewards of the company for the recovery of a penalty incurred by him for not giving a dinner to the company on lord mayor's day in pursuance of a bye-law.

So, a bye-law that "out of such corporate funds as may be thought fit," or by fine, the steward was to provide a dinner for certain members at a stated time, is bad.

Per Cur.—We are of opinion that this bye-law is bad on several grounds; it has every vice that a bye-law could have. A bye-law for the giving of a feast or dinner under particular circumstances may be good; for, if men are called together necessarily, it is fit they should have some refreshment. The case in Cro. Jac. 555, is the case of a custom; and though, under the circumstances there, the custom to give a dinner might be a good custom, yet that case is at best a very doubtful authority. Here, however, the bye-law cannot be good; for the burthen is imposed on one of the company for no purpose of business. It is therefore not such a bye-law as the company were empowered to make: they were only empowered to make bye-laws for the good order, rule, and government of their members. A bye-law which has not this for its object cannot be good. It is impossible that a dinner without any reference to the transacting of any business by the company can be the subject of a good bye-law.

DAVIES *v.* MORGAN, T. T. 1831. Ex. 1 *C. & J.* 587; S. C. 1 *Tyrw.* 457.

ON an action to recover penalties under a bye-law—

On an action for penalties for breach of a bye-law corporators are incompetent witnesses.

The Court held, in support of a bye-law in favour of a company in a corporate town to exclude strangers from free trade, a corporator is not a competent witness where the corporation participates in the penalty for infraction of the bye-law.

Sed vide, post, 198; *see* 5 *& 6 Will.* 4, *c.* 76.

2. *Since the* 5 *&* 6 *Will.* 4, *c.* 76*.

POULTERERS' COMPANY *v.* PHILLIPS, H. T. 1840. C. P. 7 *Bing. N. S.* 314.

An omission in a bye-law may be supplied by implication from the subject-matter of the bye-law.

A BYE-LAW of the Poulterers' Company enabling the master, &c. of the company to call and admit into the livery all such freemen of the company as they should think meet, and imposing a fine upon the persons so called who should refuse to be of the same livery without sufficient cause.

The Court held, to receive a reasonable construction, that a condition, that the freemen of the company called to be the livery must be such only as are eligible by law, (viz. being also freemen of the city), is necessarily to be implied from the subject of the bye-law.

HOPKINS *v.* CORPORATION OF SWANSEA, T. T. 1838. Ex. 4 *M. & W.* 621.

A corporate body becoming possessed of land by enclosure may make bye-laws regulating the rents and appropriation thereof.

A DECLARATION in debt stated, that certain lands were in 1762 enclosed by act of Parliament, reciting the fee-simple to be in B., and that the mayor and burgesses of S. were entitled to the right of pasturage; and it directed that —— acres should be allotted to the corporation, who might in common hall assembled grant such leases as should be thought reasonable; and that they did by a bye-law direct that parcel of the land should be leased to the burgesses at certain rents, out of which certain annual payments should be made to the senior burgesses, (but that no benefit should enure to any lessee), and the remainder to the benefit of the corporate body, and that such burgesses should receive their portions, to be paid by the common attorney of the borough, an office extinguished at the passing of the municipal act.

The Court held that such bye-law was reasonable, and gave a just foundation for an action by the parties entitled to receive such payments against the corporation.

* By s. 90, it is enacted, "That it shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force throughout such borough, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences: Provided that no fine so to be appointed shall exceed the sum of 5*l.*, and that no such bye-law shall be made unless at least two-thirds of the whole number of the council shall be present; provided that no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof, shall have been sent, sealed with the seal of the said borough, to one of his Majesty's principal secretaries of state, and shall have been affixed on the outer door of the town-hall or in some other public place within such borough; and if at any time within the said period of forty days, his Majesty, with the advice of his privy council, shall disallow the same bye-law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation: Provided also, that it shall be lawful for his Majesty, if he shall think fit, at any time within the said period of forty days, to enlarge the time within which such bye-law, if disallowed, shall not come into force; and no such bye-law shall in that case come into force until after the expiration of such enlarged time."

By s. 91, it is enacted, "That all the provisions hereinafter contained relative to offences against this act punishable upon summary conviction shall be taken to apply to all offences committed in breach of any bye-law or regulation made by virtue of this act."

GRAVES *v.* COLBY, M. T. 1838. Q. B. 1 *P. & D.* 235.

THE master, wardens, and assistants of the Company of Turners in London, were empowered by charter to make bye-laws and impose fines and penalties, which were to be for the use of the master, wardens, and commonalty of the company. A bye-law was made, that any liveryman of the company who should refuse to take upon himself the office of steward when elected should forfeit and pay to the master and wardens for the time being, or one of them, for the use of the company, the sum of 15*l.*

And a bye-law imposing a fine for not taking corporate offices is valid, if the charter authorizes by law such penalties.

The Court held that such bye-law was valid, and was not to be considered as reserving the penalty to a stranger. But, that the master and wardens at the time when the penalty was incurred, having gone out of office at the time when the action was commenced, were not entitled to sue for the penalty.

VII. RELATIVE TO CUSTOMS CONNECTED WITH.

REX *v.* LANGHORNE, H. T. 1836. K. B. 6 *N. & M.* 203; S. C. 4 *Ad. & E.* 538.

ON a quo warranto for usurping the office of mayor, the election was objected to because notice had not been given to some of the burgesses. The jury found specially that notice had been given according to the custom of the borough—that accidental omissions of service upon individual burgesses did not, according to that custom, vitiate the meeting, and that the omissions on this occasion were accidental.

All burgesses at corporate meetings ought to be summoned; —a custom that the omission accidentally to summon one or two should not vitiate, the meeting is bad in law*.

The Court held, that, the attendance of burgesses at corporate meetings being a public duty, all ought to be summoned; and a qualification of a custom, that the accidental omission to summon one or two should not vitiate the assembling, is not good; there is no valid distinction between the cases of select or indefinite bodies; a dispensation by a corporator is not a sufficient excuse for omitting to summon him.

VIII. RELATIVE TO THE JURISDICTION OF JUSTICES UNDER 5 & 6 WILL. 4, c. 76†.

GATESHEAD JUSTICES, *In re.* H. T. 1839. Q. B. 6 *Ad. & E.* 550.

BY 5 & 6 Will. 4, c. 76, s. 60, if any officer therein mentioned shall refuse to account, "then and in every such case, upon com-

The jurisdiction of county

* A custom in a corporate company, that all persons exercising their trade shall become members of that corporate body, seems binding. (*Mercers' Company of Shrewsbury* v. *Hart*, 1823, N. P., 1 C. & P. 112).

† And by 7 Will. 4 & 1 Vict. c. 78, "It is enacted, that all matters cognizable by virtue of any local act of Parliament, or otherwise, by any justice of the peace, or by the general quarter sessions of the peace having jurisdiction within any place which since the passing of the said act for regulating corporations, or of an act passed in the sixth and seventh year of the reign of his present Majesty, intituled 'An Act to make temporary provision for the Boundaries of certain Boroughs,' has ceased, or which under any future act may cease to be within and to be part of any borough, or the liberties thereof, shall be cognizable by the jus-

justices over corporate officers exists under the 5 & 6 Will. 4, though the corporate town has its own justices.

plaint made on behalf of the said council by such person as they shall authorize for that purpose of any such refusal or wilful neglect as aforesaid to any justice of the peace for the county or other jurisdiction wherein such officer so refusing or neglecting shall be or reside, such justice is hereby authorized and required to issue a warrant under his hand and seal for bringing such officer before any two justices of the peace for such county or jurisdiction; and upon the said officer appearing or not being found it shall be lawful for such justices to hear and determine the matter in a summary way."

Under this section as well as s. 65, the Court held, that *county* magistrates may determine complaints against corporate officers wilfully neglecting or refusing to give up books, papers, &c.; and this, though the officers be living within the precincts of the borough, and such borough has a commission of the peace.

IX. RELATIVE TO THE COURTS WITHIN THE 5 & 6 WILL. IV. c. 76.

PALMER *v.* POWELL, T. T. 1840. Ex. 6 *M. & W.* 627.

The Bristol Court of Requests is within the power of the 6 & 7 Will. 4, c. 76.

A LOCAL act of Parliament created a court of requests at Bristol, and fixed certain fees to be paid to the assessor, with power to the justices to lessen or increase them. The subsequent stat. 6 & 7 Will. 4, c. 105, s. 8, enacts, that "Every thing provided in any such local acts to be done by the justices, or by some particular class or description of members of such body corporate, being justices, at some court of general or quarter sessions assembled, and which does not relate to the business of a court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The town council, acting under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 124, reduced the assessor's fees.

Per Cur.—The question in this case was, whether the assessor of the Court of Requests at Bristol was entitled to recover certain fees, according to a scale fixed by a local act of Parliament. Under the act, as it stands, he was entitled to his fees; but the defence was, that by the stat. 6 & 7 Will. 4, c. 105, s. 8, the common council had power to reduce these fees, and that they had so reduced them according to a schedule fixed upon by them. The question is, whether they had the power of making such reduction. It appears that by the original local act of Parliament, the justices were authorized to reduce or advance those fees as they should think fit; and if such justices had acted under that authority there would have been no question in the case. But the point for consideration is, whether the town-council are empowered to do what the justices might have done; and that depends upon the terms of the 8th section. After some consideration of the case, we are agreed in opinion, that the reduction of the fees of the Court of Requests in

tices of the peace or the general or quarter sessions of the county, riding, or division, liberty, or jurisdiction, within which such place is situate, in the same manner and subject to the same provisions as the same were within the jurisdiction of the justices of the peace for that borough or place, or of the general or quarter sessions of the same."

this case is a matter relating to the business of a court of "civil judicature," and therefore that the town-council had no authority to make the reduction.

REGINA *v.* PARRY, T. T. 1837. Q. B. 2 *N. & P.* 414; S. C. 6 *Ad. & E.* 840.

ON a question who was entitled to revise the burgess lists under the 5 & 6 Will. 4, c. 76, s. 43—

Under the 43rd section of 5 & 6 Will. 4, where a borough is divided into wards and an assessor appointed for each ward, he and the mayor constitute the court to revise the burgess list.

The Court said, that, in the case of a borough divided into wards, the court of revision of the burgess lists is to be constituted by the mayor and assessor for the ward, and not by the mayor and assessors for the whole borough, and if so revised, the irregularity is a ground for a quo warranto; but where it was sanctioned by legal advice and under no improper motive, nor attended with any serious consequences, the Court acting on its discretionary power refused the writ, the granting it having a probable tendency to dissolve the entire corporation.

X. RELATIVE TO THE BOROUGH RATE UNDER THE 5 & 6 WILL. IV. c. 76.

WOODS *v.* REED, E. T. 1837. Ex. 2 *M. & W.* 777.

ON the question as to the validity of a retrospective rate made under the 92d section of the 5 & 6 Will. 4, c. 76—

The 5 & 6 Will. 4*, only sanctions prospec-

Per Cur.—We think the act intended the rate to be prospective

* C. 76, s. 92, it is enacted, "That, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all monies due, chattels and valuable securities, belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A.) and (B.), or to any member or officer thereof, in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has been already provided for), shall be paid to the treasurer of such borough; and all the monies which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required, or shall deem it expedient, to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings, either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, toward the expenses of the prosecution, maintenance and punishment of offenders, and toward such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and toward the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act; and in

tive and not retrospective rates.

and not retrospective. It could never be the intention to give a council the power, first, to incur expenses, and then make a rate to meet them; but they are first to estimate the expense and then levy a

case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the benefit of the inhabitants and improvement of the borough; provided that it shall not be lawful for the council to be elected under the provisions of this act in any borough in which the body corporate named in conjunction with the said borough, in the said schedules (A.) and (B.), before the time of the passing of this act, shall have contracted any lawful debt chargeable on any tolls or dues belonging or payable to the said body corporate, or to any member or officer thereof in his corporate capacity, or toward the satisfaction whereof such tolls or dues, or any part thereof, were applicable before the passing of this act, to alter or reduce the amount to be levied and payable of such tolls or dues, or to grant for any consideration any remission of, or exemption from, such tolls or dues, or any part thereof, unless with the consent in writing under the hands of a majority in number and amount of the creditors to whom such debt is due, until after such debt, and all arrears of interest due thereon, shall have been fully paid and satisfied; and in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and, in order to raise the amount so estimated, the said council is hereby authorized and required, from time to time, to order a borough rate, in the nature of a county rate, to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace, assembled at their general or quarter sessions, in any county in England, have within the limits of their commission, by virtue of an act made in the fifty-fifth year of his late Majesty King George the Third, intituled 'An Act to amend an Act of his late Majesty King George the Second, for the more easy assessing, collecting, and levying of County Rates,' or as near thereto as the nature of the case will admit, except as is hereinafter excepted; and all warrants required by the said act to be issued under the hands and seals of two or more justices, shall in like case be signed by the mayor, and sealed with the seal of the borough: provided that such council shall not be empowered to receive, hear, or determine any appeal against any such rate; and if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the recorder hereinafter mentioned at the next quarter sessions for the borough in which such rate has been made, or in case there shall be no recorder within such borough, to the justices at the next court of quarter sessions for the county within which such borough is situate, or whereunto it is adjacent; and such recorder or justices respectively shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate; and all such sums levied in pursuance of such borough rate shall be paid over to the account of the borough fund, and, subject to the provisions hereinbefore contained, shall be applied to all purposes to which, before the passing of this act, a borough rate or county rate was applicable in such borough or county: provided that, in every case in which, before the passing of this act, any rate might be levied in any borough, or in any parish or place made part of any borough under the provisions of this act, for the purpose of watching solely by day or by night, or for the purpose of watching by day or by night conjointly with any other purpose, it shall be lawful for the council of such borough to levy a watch-rate sufficient to raise any sum not greater than the average yearly sum which, during the last seven years, or when such rate shall not have been levied during seven years, then during such less number of years as such rate shall have been levied, shall have been expended in the maintenance and establishment of watchmen, constables, patrol, or policemen within the district in which such rate was levied, and for that purpose the council shall have all the powers hereinbefore given to the council in the matter of the borough rate; and where any part of any borough shall not, at the time of the passing of this act, be within the provisions of the act authorizing the levy of such rate for watching as aforesaid, it shall be lawful for the council, from time to time, to order that such part, or so much thereof as to the council shall seem fit, shall be rated to the watch-rate in like manner as other parts of the borough to be specified in such order, and such watch-rate thereupon shall be levied within the part mentioned in such order in like manner as in the other parts of

rate. This mode is much more likely to make a council economical than if they first incurred the debt and then provided the means to satisfy it. Out of the borough fund the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, are to be paid; so that unless the rate is prospective the council may impose the cost of heavy salaries on the borough, and leave to the successors the odium of levying the money to pay them. It seems to us, therefore, not only that the legislature have said that the rates shall not be retrospective, but have said so wisely.

REGINA *v.* MAYOR OF BRIDGNORTH, E. T. 1839. Q. B. 10 *Ad. & E.* 66; S. C. 2 *P. & D.* 317.

The payment of rates under 5 & 6 Will. 4, c. 76, s. 9, though by another, is to be treated as by the burgess himself, unless paid in a mass for several.

RULE for a mandamus to command the defendant to insert in the burgess list of the borough the names of seventy-eight persons, who alleged that they had been improperly excluded. The mayor had rejected them, on the ground that, though the rates to which they were assessed had been paid, it was not proved that they had themselves paid their own rates; on the contrary, it appeared that the rates of all these persons had been paid by some individual in a mass, and there was no proof that this payment was made with the authority or knowledge of the parties themselves; he, therefore, decided, that they were not entitled under the 9th section of the 5 & 6 Will. 4, c. 76, to be placed on the burgess roll.

The Court held, that the mayor was right to refuse to put their names on the burgess roll; for that the payment of rates, under the 5 & 6 Will. 4, c. 76, s. 9, must be made in such a manner as to be properly considered as the act of the party in whose name it is made.

REX *v.* RECORDER OF POOLE, E. T. 1837. K. B. 1 *N. & P.* 756.

On an appeal against a rate, the notice must state the appellant to be a party grieved.

FRANCIS TURNER, intending to appeal against a borough rate, made by the mayor and council of the borough of Poole, on the 2nd of January last, served the following notice of appeal on the mayor, town clerk, and clerk of the peace, high constable, and the former town clerk of the said borough:—"To the mayor and town council of the borough of Poole—I, F. T., being a burgess of the borough of Poole, and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you, and each and every of you notice, that I intend to appeal, and shall appeal at the next general quarter sessions of the peace, to be holden in and for the

the borough so specified, and all such sums levied in pursuance of such watch-rate shall be paid over to the account of the borough fund: provided always, that no such order as last aforesaid shall be made for rating to such watch-rate any part of any borough in which, at the time of passing this act, such rate as aforesaid shall not be levied, and which is more than two hundred yards distant from any street or continuous line of houses, which shall be regularly watched within the borough under the provisions of this act: provided also, that nothing in this act contained shall be construed to render liable to the payment of any debt contracted, before the passing of this act, by any body corporate, any part of the real or personal estate of the said body corporate, which, before the passing of this act, was not liable thereto, or to authorize the levy of any rate within any part of any borough for the purpose of paying any debt contracted before the passing of this act, which, before the passing of this act, could not lawfully be levied therein towards the payment of the same."

said borough on the 10th of April next, against a borough rate, at a meeting of the council of the said borough held on Monday and Tuesday the 2nd and 3rd of January last, ordered and resolved to be raised for the payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated," &c.

Per Cur.—We must hold, that the notice in this case, not stating that the appellant was a party aggrieved, was insufficient. We state this opinion with some degree of regret, but it is diminished by the consideration that the omission which renders the notice insufficient might have been easily supplied.

REGINA *v.* RECORDER OF CARMARTHEN, H. T. 1838. K. B. 3 *N. & P.* 19.

Notice of appeal against a borough rate may be served on the town-clerk.

ON an appeal against a borough rate, the appellant proved, that notice had been given to the mayor, town-clerk, high constable, the late and the present parish officers of the parish in which the appellant was assessed. It was objected, however, that a notice of appeal ought to have been given to the clerk of the peace of the borough, and not having been given, that the appeal could not be heard. The recorder was of this opinion, and refused to hear it.

Per Cur.—The recorder ought to have heard the appeal. The notice of appeal which is given to the clerk of the peace is given to the servant of the justices, who make the rate. The town council make the borough rate, and the town-clerk is their servant, and has a similar authority to that of the clerk of the peace. We must not look at the words, but at the principle and reason of the act of Parliament. The town-clerk is the same person as the clerk of the peace of the county in regard to this matter; and the fact of their being another person, who is clerk of the peace of the borough, is immaterial. We should be sorry, however, to think, that any doubt existed as to the necessity of a notice of appeal.

FERNELEY *v.* WORTHINGHAM, H. T. 1841. C. P. 1 *Scott, N. S.* 432; S. C. 1 *M. & G.* 491.

Since the Municipal Corporation Act, the mayor cannot issue his warrant for non-payment of a borough rate.

BY 5 & 6 Will. 4, c. 76, s. 92, after empowering the council of any borough to raise a borough rate in the nature of a county rate within the borough, enacts, that "for that purpose the council of such borough shall have, within their borough, all the powers which any justices of the peace, assembled at their general or quarter sessions, have, by virtue of the 55 Geo. 3, c. 51, or as near thereto as the nature of the case will admit, except as thereinafter excepted; and all warrants required by the said act to be issued under the hands and seals of two or more justices, shall, in like case, be signed by the mayor, and sealed with the seal of the borough." The mayor of the borough of S., under the 92nd section, signed a warrant of distress for levying on the overseer of a township, which was partly within and partly without the borough, the proportion of a borough rate payable in respect of that part of the township which was within the borough.

The Court held, that he had no jurisdiction to grant such warrant, and that trespass was maintainable against him for the seizure made under it.

XI. RELATIVE TO THE REMEDIES CONNECTED WITH.

(*a*) Before 5 & 6 Will. 4, c. 76.

1. *Actions by**.

2. *Actions against.*

Henley *v.* Mayor of Lyme Regis, T. T. 1828. C. P. 5 *Bing.* 91.

An action lies against a corporation for damage arising from the want of repair of sea-walls belonging to a borough quay granted to them by charter from which they receive toll.

In an action on the case for neglecting to repair sea-walls, it appeared, that the defendants are the grantees of the borough of Lyme Regis, and of the market and cob-tolls or dues, and that, by an act of Parliament relative to the borough of Lyme, these tolls and dues the corporation have from all times had. The corporation were charged with a liability to repair certain sea-walls.

Per Cur.—It has been insisted that the plaintiff claims a degree of protection which the charter, under which the borough of Lyme, and the tolls and dues before-mentioned, were granted to the defendants, does not give him. We think there is no foundation for that argument, as the charter was given expressly for the protection of the land. It has been further insisted, that, although the Crown might have a right to complain, yet that an individual cannot. It is true that this is a grant from the Crown, and it has been urged, that, if the grantees have not complied with the conditions of the grant, the Crown might have a scire facias to deprive them of the rights they hold under it, they not having fulfilled the trusts upon which those rights were conferred on them. But, on the other hand, it has been insisted that a private individual cannot maintain an action for any injury he may have sustained in consequence of the corporation not having performed the trusts which the Crown reposed in them at the time of the grant, or rather by their not having executed the duty which was the consideration for the making of the grant. We take it to be clear, that, if a public officer abuse his office, either by an act of omission or commission, and an injury is thereby inflicted on an individual, an action will lie against him.

---

3. *Evidence*† *and Witnesses.*

Doe *v.* Tooth, H. T. 1829. Ex. 3 *Y. & J.* 19.

In ejectment to recover corporate land, a corporator cannot be a witness.

In ejectment, the question was, whether a member of a corporation was a competent witness to sustain the claim of the corporation, if he released his interest in the subject-matter of the suit?

* A corporation held entitled to maintain assumpsit for the occupation of tolls of a market, although no interest had passed by grant under seal. (*Mayor, &c. of Carmarthen* v. *Lewis*, 1834, N. P., 6 C. & P. 608).

† An examined copy of a charter deposited in the proper public office at Madrid:—Held sufficient proof of the plaintiffs being a corporation according to the laws of Spain. (*National Bank of St. Charles* v. *De Bernales*, 1825, N. P., 1 R. & M. 190; S. C. 1 C. & P. 569). So, copies of an ancient schedule produced from the muniments of the corporation, delivered to the toll collectors, and

Per Cur.—The question is simply, whether a member of a corporation is a competent witness in an action by the corporation in respect of corporation property. Independently of the release, no question could be entertained; for he is interested, not only in the property to be recovered, but also in the fund out of which the costs may, in one event, ultimately come. In order to strip him of his interest, and to render him competent, a release is put in, by which he releases his right in respect of this property. But, assuming that the corporation are unsuccessful in this action, out of what fund are the costs to come? Undoubtedly out of the funds of the corporation; with respect to which, notwithstanding the release, the witness retains his interest.

Bailiff of Godmanchester *v.* Phillips, H. T. 1836. K. B. 6 *N. & M.* 211; S. C. 4 *Ad. & E.* 550.

To render a corporator a competent witness, he must have resigned before a competent body.

In a suit to which a corporation were parties, and a corporator who had been disfranchised before the trial was tendered as a witness, the charter requiring all corporate acts to be executed at a meeting whereat the two bailiffs and twelve assistants should be present.

The Court held, that a resignation at a meeting where a less number were present was not a valid resignation, and that he was not therefore a competent witness, and that a release by him to the body of which he still constituted a part did not render him competent:—Held, also, that the 2 & 3 Will. 4, c. 42, did not apply to such a case.

Sed vede, 5 & 6 *Will* 4, *s.* 76, *c.* 128.

(*b*) Since the 5 & 6 Will. 4, c. 76.

1. *Of the Form of Action.*

Church *v.* Imperial Gas Company, H. T. 1838. Q. B. 3 *N. & P.* 35; S. C. 7 *Ad. & E.* 846 *.

A corporation may maintain assumpsit for not supplying gas according to contract, whether it be executed or executory;

Error on a judgment in the Palace Court. The record set out the declaration thus:—The Imperial Gas Light and Coke Company complain of the defendant; for that the defendant, on &c., within &c., bargained and agreed to take of the plaintiffs, and the plaintiffs agreed to supply to the defendant, a certain large quantity of gas, to wit, &c., from the 21st July, 1833, and so on from year to year, at the rate of 12*l.* 16*s.* for two lights; and the defendant, in consideration thereof, and that the plaintiffs had promised to supply the gas, promised to accept the said gas from the plaintiffs, and pay for the same, at the price aforesaid, quarterly, and to give three months' notice of discontinuing to take the said gas. Averment, that the

by which they collected:—Held admissible for the corporation, although it would have been otherwise if not shewn to have been delivered from the corporation, however accurately corresponding. (*Brett* v. *Beales*, 1832, N. P., M. & M. 417).

* Overruling the distinction in the case of the *East London Waterworks Company* v. *Bailey*, (4 Bing. 283; S. C. 12 Moore, 533).

plaintiffs were ready and willing to supply the gas, and that the defendant did not give the notice, but refused to accept the gas. The second count was for goods bargained and sold; the third for goods sold and delivered; and the fourth on an account stated.

Per Cur.—It has been considered that the plaintiffs being a corporation, were incapable of suing in assumpsit on an executory contract, and the distinction was taken between a contract executory and executed. In support of this distinction, the case of *The East London Waterworks* v. *Bailey*, (4 Bing. 283), was cited as a direct authority. When this case was argued, this Court had not pronounced its judgment in *Beverley* v. *The Lincoln Gas Company*, (*infra*), in which it has determined that assumpsit is maintainable against a corporation upon an executed contract for goods sold and delivered. We do not mention this latter case as directly in point, but because having there considered at some length the principles upon which the law stands as to the powers and liabilities of corporations in respect of parol contracts, we are now relieved from some parts of the inquiry which it might otherwise have been necessary to have gone through. Assuming it, therefore, to have been now established in this Court that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be, whether, as affecting this point, and in respect of such contracts, there is any sound distinction between contracts executed and executory. Now, the same contract which is executory to-day may become executed to-morrow. If the breach of it in its latter state may be sued for, it can only be on the supposition that the party was competent to enter into it in its former; and if the party were so competent, on what ground can it be said that the peculiar remedy which the law gives for the enforcement of such a contract may not be used for the purpose?

BEVERLEY *v.* LINCOLN GAS COMPANY, H. T. 1838. Q. B. 2 *N. & P.* 283; S. C. 6 *A. & E.* 829.

as an executed parol contract.

ON a writ of trial, it was proved that the plaintiff, who was a manufacturer of gas-meters, had been directed by the proprietors of the Lincoln Gas Company, which was a corporation, to make a meter for the company; and the committee subsequently ratified that order, and also gave the plaintiff an order for five more. It appeared that they had been sent under an understanding or agreement, that, if they did not answer, they were to be taken back free of expense. The company ultimately rejected them, on the ground that they would not answer, but had retained them a considerable time, and, as the jury found, for an unreasonable time. It was objected, first, that under these circumstances an action of assumpsit was not maintainable; and secondly, that the corporation could not be made liable, the contract not being under seal. These objections were both overruled by the assessor, who reserved the points, and the plaintiff recovered a verdict. On motion to set the verdict aside—

The Court held, that a corporation aggregate may enter into a contract not under their common seal, and may be sued in assumpsit for the breach of it.

2. *On what Contract maintainable.*

MAYOR OF STAFFORD *v.* TILL, H. T. 1827. C. P. 4 *Bing.* 75.

If the contract be executed, a corporation aggregate may sue, though the contract was not by deed; as for the use and occupation of a house.

ASSUMPSIT for use and occupation. The plaintiff having proved that the defendant was in the occupation of the premises, and that four years' rent were due at Michaelmas 1825, and that he had made several payments previously to that time. It was objected for the defendant that the action could not be maintained, on the ground that assumpsit would not lie for use and occupation at the suit of a corporation, but that their remedy, if any, was by an action of debt; and even then, that a demise by a corporation could only be by deed. The jury, however, found a verdict for the plaintiff.

Per Cur.—In this case an application has been made for a nonsuit, or that the judgment might be arrested on the same question, viz. whether a corporation aggregate can maintain an action of assumpsit for use and occupation against a party who has occupied premises under them, and which was their property. As the defendant had occupied, the contract was executed; and therefore no express promise need have been proved. It may be inferred that, where property has been enjoyed, the party who has occupied is bound to pay; and the law will infer a promise to do so. In executory contracts it is different, as in such cases there must be a mutuality of obligation, to which a corporation aggregate can only assent or be a party by deed. Here, however, there is a good consideration, as from the enjoyment of the land by the defendant a promise must be implied.

---

3. *Changing the Venue.*

THORNTON *v.* JENNINGS, E. T. 1839. C. P. 7 *D. P. C.* 449; S. C. 5 *Bing. N. S.* 485.

A cause being connected with a corporation is no ground for changing the venue.

IN an action brought by the commissioners of the Bedford Level against certain persons for the non-performance of a contract, pursuant to an agreement, a motion was made to change the venue from Cambridgeshire, on the ground that many of the jurors might be liable to drainage rates imposed by the plaintiffs.

The Court were of opinion that the circumstances disclosed in support of the rule shewed no ground for supposing that the cause might not be well tried in the county where the venue was now laid.

---

4. *Pleas.*

CORPORATION OF LUDLOW *v.* CHARLTON, M. T. 1840. EX. 8 *M. & W.* 815; S. C. 9 *C. & P.* 242.

A corporation agreed to allow a tenant a sum of money for repairs; a minute was made to that effect in the corporation books:—Held, that a plea of

COVENANT on a lease between the corporation and the defendant for non-payment of rent. Pleas, payment, a set-off, and a plea that, before the arrears of rent became due, it was agreed between the plaintiffs and the defendant that the defendant should alter certain premises, together with a road belonging to him, and that for so doing he should be paid by the plaintiffs the sum of 550*l.*; that after the arrears of rent became due, it was agreed between the plaintiffs and the defendant that the arrears should be applied in satisfaction

of the said sum so agreed to be paid by the plaintiffs to the defendant; that the defendant should not pay the arrears, but should deduct the amount thereof from the sum so agreed to be paid him as aforesaid; and that the plaintiffs should pay him that sum, less the amount of the arrears of rent. The plea then averred the alteration by the defendant of the said premises and road. It was proved that, at a meeting of the corporation of Ludlow, a discussion took place as to an obstruction caused by the Charlton Arms Inn, the property of the defendant, when it was resolved by the corporation, and assented to by the defendant, who was present, that the latter should remove the obstruction on being paid the sum of 500*l.* by the corporation. On the same day the following entry was made in the corporation books:—"Ordered, that Mr. Charlton be paid 500*l.* for alterations in the Charlton Arms Inn, provided he gives his assent, or causes the work to be executed." This resolution was not stamped, nor was the corporation seal affixed to it.

set-off could not be supported, as the corporation could only bind themselves by deed.

The Court held, that the corporation were not bound to pay the money, the contract not being under seal.

---

5. *Evidence*, and Inspection of Corporation Books.*

IMPERIAL GAS COMPANY *v.* CLARKE, M. T. 1830. C. P. 7 *Bing.* 95; S. C. 4 *M. & P.* 727.

AN action on the case against the defendants, late directors of the Imperial Gas Light and Coke Company, for making false entries in the books of the company, and false returns to the quarterly meetings, thereby inducing the managers of the company to declare larger dividends than the state of their funds warranted. Application was made on the part of the defendants, that they might be permitted to inspect and take copies of the alleged false entries, they not being disclosed in the declaration, and no particulars having been delivered.

In an action against a director for false entries, he has no right to inspect the corporate books.

Per Cur.—It seems to us that the defendants have not brought themselves within the rule. They have not shewn that they are unable to go on with their defence without the inspection they seek. They should, at all events, shew us that the books in question contain something that is material to their defence.

---

6. *Witnesses.*

DOE *v.* MAPLE, E. T. 1837. C. P. 2 *Bing. N. S.* 832.

THE old corporation of Ipswich, whose property the lands were, made a lease of them in 1796 to one Ellis, who occupied until 1815; and it purported to be an assignment of property from Burthrop to

A rate-payer, since the 5 & 6 Will. 4, c. 76†, is a competent

* Under 5 & 6 Will. 4, an increased value had been put upon a corporate lease:—Held, that the tenant was bound to produce the copy, though the original was in the possession of the corporation. (*Mayor, &c., of Arundel* v. *Holmes*, M. T. 1839, B. C., 8 D. P. C. 118).

Where a corporation came to a resolution for agreement with a tenant of the corporation, that in consideration of his making certain alterations he should be allowed a sum in part of rent:—Held, that the entry in the minutes was not admissible as evidence of the agreement of the corporation, not being under their seal. (*Corporation of Ludlow* v. *Charlton*, 1840, N. P., 9 C. & P. 242).

† By s. 128 it is enacted, "That no person, although liable to the rate, con-

witness in an action by the assignee of a corporate lease.

T. Pytches, for the remainder of a term of 900 years, to secure 1,500*l.* and interest. This deed was stamped with a deed-stamp, and recited the original mortgage in 1775, and a subsequent assignment to Batley, then town-clerk of Ipswich, in trust for the corporation; and then an assignment from Batley to Burthrop. The defendant became tenant to the premises in 1818, (three years after the date of the deed of assignment to the lessor), under a lease from the corporation. Upon the dissolution of the old corporation under the late act, 5 & 6 Will. 4, c. 76, the tenants refused to pay their rents; and in August 1836 the lessor served the following notice upon the defendant:—"As mortgagee of the Ipswich corporation marshes, now in your occupation, I do hereby give you notice, and require you forthwith to pay to me all arrears of rent now due, and all rent that shall hereafter become due from you for the same, in order that such rent may be by me applied in or towards payment and satisfaction or discharge of the interest money due, and to accrue due to me as such mortgagee as aforesaid; and in default of your compliance herewith, legal measures will be taken for the recovery of such rent, interest," &c. In ejectment, the rate-payers had been called as witnesses to prove the defendant's title.

Per Cur.—We are unable to see upon what ground it can be said that these rate-payers, when called upon to give evidence, can be objected to as incompetent from interest. This is an action of ejectment by the mortgagee against the tenant in possession; and the mortgagee is in a court of law considered as a purchaser, and who, as such, seeks to recover the actual possession, and turn out all whom he may find upon the land. Is it not, therefore, the interest of the rate-payers that things should continue as they were? And when they are called upon to give their evidence, as they were upon this occasion, were they not in fact called upon to testify against their own interest?

---

7. *Costs**.

REGINA *v.* MAYOR OF BRIDGEWATER, T. T. 1839. Q. B. 2 *P. & D.* 559; S. C. 10 *A. & E.* 281.

The costs of proceeding against officers for misconduct cannot be paid out of the corporate funds.

THE Court of Queen's Bench quashed an order of the town council, for payment of the expenses of opposing two rules, and for a quo warranto information against a person duly elected a councillor, and the other for a criminal information against an alderman of the borough for alleged misconduct, on the ground that the expenses were not incurred for public purposes.

HOLDSWORTH *v.* CORPORATION OF DARTMOUTH, H. T. 1840. Q. B. 11 *A. & E.* 490; S. C. 3 *P. & D.* 308.

A bond entered into by a cor-

UPON the trial of an action of debt upon a bond, the jury found a special verdict, which stated, "that the bond was obtained fairly

tributing to the borough fund of any borough, shall be deemed an incompetent witness in proof of any offence against this act, by reason of any penalty or forfeiture for such offence being applicable to the use of such borough fund; and no justice of the peace shall be disabled from acting in the execution of this act by reason of his being liable to the rate contributing to the borough fund of any borough."

* See sect. 92, 5 & 6 Will. 4, c. 76, div. X., p. 199, relative to the borough-rate.

and honestly by the plaintiff, and not by any fraud, covin, or misrepresentation; that the plaintiff applied to certain persons, then being members of the corporation, and being the governing body thereof, to pay him certain costs and charges incurred by him, as a member of the corporation, without any authority from them, in defending certain quo warranto informations; that those persons, then being the governing body, and having the custody of, and lawful power to affix the corporation seal to instruments, did affix the corporation seal to the said writing, and delivered the same to the plaintiff, by way of re-imbursement of the said costs and charges, and for no other cause or consideration whatsoever. That the bond was delivered for the cause aforesaid, and not for any debt or sum of money due and owing from the defendants to the plaintiff; nor was there ever any valuable consideration, or value, or cause, or matter, or thing whatsoever, for the sealing and delivery of the said writing to the plaintiff, save as aforesaid." The bond was given, 1833, before the passing of the Municipal Reform Act.

poration to indemnify corporate offices against costs, &c., is a lawful debt, and not within 5 & 6 Will. 4, c. 76.

The Court held, that, upon this finding, "lawful debt" existed before the passing of that act; and that, therefore, the case was excepted out of the operation of that statute by the 92nd section, and the plaintiff was entitled to recover.

XII. RELATIVE TO CORPORATIONS FOREIGN* AND SCOTCH BURGHS†.

Costs.

I. RELATIVE TO THE DEFINITION AND NATURE OF, p. 213.

II. RELATIVE TO CIVIL PROCEEDINGS.

(*a*) In genenal.

1. *Plaintiff, when entitled to,* p. 213.
2. *Defendant, when entitled to,* p. 216.
3. *Of the Judge's Certificate to deprive Plaintiff of Costs,* p. 216.

* A corporation in a foreign country may sue in this by their corporate name; and held, that, where they sued by the name of the National Bank of St. C., and it appeared that the name given in the charter was "The Bank of St. C.," the variance was immaterial, if the jury were satisfied as to their identity. (*National Bank of St. Charles* v. *De Bernales,* 1825, N. P., 1 Ry. & M. 190; S. C. 1 Carr. & P. 569).

† Where, upon the Crown having restored a Scotch burgh, an action of reduction and declaration was raised for setting aside the election of magistrates:—Held, that it was to be deemed an annual election, and a complaint within the intent and meaning of the stats. 7 Geo. 2, c. 16, s. 7, and 16 Geo. 2, c. 11, s. 72; and the action, therefore, to be brought within two months. (*Tod* v. *Tod,* 1 Bli. N. S., C. P., 639). 2. The form of election to offices of a Scotch burgh is of the essence of the election; and it is not competent to the Court of Session to sustain it where the form has not been observed, although the result may be the same; and a usage of forty years may alter the original constitution of the burgh. (*Gardner* v. *Reekie,* 1 Bli. N. S., C. P., 646).

II. RELATIVE TO CIVIL PROCEEDINGS—(*continued*).

4. *When there shall be no more Costs than Damages*, p. 219.

5. *Of the Judge's Right to allow Costs at Chambers*, p. 219.

6. *Of Double and Treble Costs*, p. 220.

7. *When Plaintiff and Defendant pay their own Costs*, p. 221.

8. *Effect of succeeding on one of several Counts*, p. 221.

9. *Effect of succeeding on one of several Pleas*, p. 222.

10. *Effect of succeeding on all or one of several Issues*, p. 222.

11. *As to Costs in the Cause*, p. 224.

12. *As to Costs of the Day*, p. 225.

13. *As to the Admission and Proof of written Documents*, p. 226.

14. *As to Witnesses*, p. 227.

15. *As to Rules and Motions, and staying Proceedings*, p. 229.

16. *As to Re-pleader*, p. 230.

17. *Under particular Statutes*, p. 231.

18. *On Entry, Writ of*, p. 231.

19. *On View, Writ of*, p. 231.

20. *On a Venire de Novo*, p. 232.

21. *As to Models, &c.*, p. 232.

22. *In the House of Lords*, p. 232.

23. *As to the Power of the Court to order Third Parties to pay Costs*, p. 232.

(*b*) IN PARTICULAR.

1. *As to particular Actions.*

1.—*Real.* See tits.

Darrein Presentment, *Formedon*, *Right, Writ of.*

2.—*Mixed.* See tits.

Dower, *Ejectment*, *Quare Impedit*, *Waste.*

3.—*Personal.*

1. *Ex contractu.* See tits.

Account, *Assumpsit*, *Covenant*, *Debt*, *Detinue.*

RELATIVE TO CIVIL PROCEEDINGS—(*continued*).

2. *Ex delicto.* See tits.

Case,
Replevin,
Trespass,
Trover.

2. *As to particular Writs.* See tits.

Certiorari,
Extent,
Habeas Corpus,
Inquiry,
Mandamus,
Process,
Prohibition,
Scire Facias.

3. *As to particular Causes of Action.* See tits.

Adultery,
Annuity,
Apprentice,
Arbitration and Award,
Assault and Battery,
Bail Bond,
Bastardy,
Bills and Notes,
Bond,
Bribery,
Common,
Compounding,
Contract,
Copyhold,
Deceit,
Forcible Entry,
Free Warren,
Game,
Highways,
Imprisonment,
Inclosures,
Insurance,
Libel,
Malicious Arrest,
Mesne Profits,
Mortgage,
Party Wall,
Penalty,
Scandalum Magnatum,
Slander,
Tithes,
Waste,

4. *As to particular Persons.* See tits.

Attorney,
Bail,
Bankrupt,
Baron and Feme,
Churchwardens,
Clerk of the Peace,
Constables,
Excise and Custom House Officers,
Executors and Administrators,
Infant,
Informer, Common,
Ingrossers,
Jury,
Justices of the Peace,
Outlaws,
Overseers,
Paupers,
Sheriff.
Surveyors.

5. *As to Miscellaneous Proceedings.* See tits.

Abatement,
Admiralty,
Amendment,
Audita Querela,
Demurrer,
Discontinuance,
Error,
Feigned Issue,
Foreign Attachment,
Hundred,
New Trials,
Nolle prosequi,
Outlawry,
Payment of Money into Court,
Qui tam,
Remanet,
Repleader,
Rules, Motions, and Orders,
Sessions,
Sham Plea,
Staying Proceedings,
Striking out Counts,
Trial.

II. RELATIVE TO CIVIL PROCEEDINGS—(*continued*).

(*c*) As to security for.

1.—*In general*, p. 233.

2.—*In particular.*

1. *As to the Form of Action*, p. 234.

2. *As to Individuals.*

1. *Persons who reside abroad, or out of the jurisdiction of the Court*, p. 235.
2. *Bankrupts*, p. 237.
3. *Executors and Administrators*, p. 239.
4. *Husband and Wife*, p. 239.
5. *Infants*, p. 239.
6. *Insolvents*, p. 239.
7. *Kings, Foreign*, p. 240.
8. *Lunatics*, p. 240.
9. *Peers*, p. 240.
10. *Prisoners*, p. 240.
11. *Seamen*, p. 241.
12. *Poverty*, p. 241.

3.—*Application for, how and when made.*

1. *How made*, p. 241.
2. *When to be made*, p. 243.

4.—*Effect of Order for*, p. 244.

5.—*As to further Security, and New Sureties*, p. 244.

6.—*As to exonerating Sureties*, p. 245.

(*d*) As to the taxation of.

1. *Of the Notice to tax*, p. 245.
2. *Of the Power of the Taxing Officer, and the course he is to pursue on Taxation*, p. 247.
3. *What are taxable Items, and of the Charges to be allowed, and by what Court ordered*, p. 248.
4. *As to whether the Taxation is to be according to the higher or lower Scale*, p. 250.
5. *As to the delivery of the Bill before Taxation*, p. 251.
6. *Of the Allocatur*, p. 252.
7. *Reviewing of*, p. 252.

(*e*) As to the set-off of, p. 254.

II. RELATIVE TO CIVIL PROCEEDINGS—(*continued*).

(*f*) As to the remedies for.

1. *By Execution*, p. 257.
2. *By Action*, p. 257.
3. *By Attachment.*
   1.—*When it lies*, p. 257.
   2.—*Against whom it lies*, p. 258.
   3.—*General requisites to obtain*, p. 259.
   4.—*Of the Demand*, p. 259.
   5.—*Of the Rule*, p. 260.
4. *By Habeas Corpus*, p. 262.

III. RELATIVE TO CRIMINAL PROCEEDINGS, p. 263.

I. RELATIVE TO THE DEFINITION AND NATURE OF*.

II. RELATIVE TO CIVIL PROCEEDINGS.

(*a*) In general.

1. *Plaintiff, when entitled to*†.

By 3 & 4 Vict. c. 24—"Whereas an act passed in the forty-third year of the reign of Queen Elizabeth, intituled 'An Act to avoid trifling and frivolous Suits in Law, in her Majesty's Courts in Westminster;' and another act, in the twenty-second and twenty-third years of the reign of King Charles the Second, intituled 'An Act

The 3 & 4 Vict. repeals so much of the 43 Eliz.‡ as relates to "trespass" and "case," and the

* Costs are the fees and disbursements payable on the institution and defence of suits and actions. In a legal sense, they are included in the word damages. (9 East, 298). In a practical point of view, they comprehend whatever charges become incidental to business done by attorney, in a cause between party and party.

Costs may be considered either as between attorney and client, being what are payable in every case to the attorney by his client, whether he be ultimately successful or not; or as between party and party, being those only which are allowed, in some particular cases, to the party succeeding against his adversary. As between party and party they are interlocutory or final: the former are given on various intermediate proceedings in the course of the suit; the latter are not allowed until the conclusion of the suit.

Costs are either at law or in equity: the observations and cases in this abridgment are of course confined to the former.

† *At Common Law.*]—By the common law, the plaintiff was not entitled to recover costs, eo nomine. (See Hull. on Costs, 1). And if he failed in his action, he was amerced, pro falso clamore. (See 1 Salk. 14). Yet, in point of fact, it seems they were always considered and included in the quantum of damages. (See 3 Blac. Com. 399).

‡ *By Statute.*]—By the Statute of Gloucester, (6 Ed. 1, c. 1), it is provided that "the demandant may recover against the tenant the costs of his writ purchased, which, by a literal interpretation, has been construed to extend to the whole legal costs of a suit, (2 Inst. 288), together with his damages; and that such statute should hold place in all cases, where a man recovers damages." See Abridgment, tit. *Costs.*

22 & 23 Car. 2*, as regards personal actions,

for laying Impositions on Proceedings at Law,' which recites that many good subjects of this realm have been and daily are undone by such suits, contrary to the intention of the said statute of Queen Elizabeth; but the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provisions for the prevention thereof, it is enacted, that the said recited act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the twenty-second and twenty-third of Charles the Second, as relates to costs in personal actions, be and they are hereby repealed."

where the damages are under 40s., unless the judge certifies;

By sect. 2, it is enacted, "That if the plaintiff, in any action of trespass, or of trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the Judge or presiding officer, before whom such verdict shall be obtained, shall, immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious."

Actions to try a right or injury, wilful or malicious, not to extend to trespass to land, after notice.

By sect. 3.—"Provided always, and it is enacted, that nothing herein contained shall extend to or be construed to extend to deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or inclosures; or for entering into any dwellings, out-buildings, or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

And the 4 & 5 Vict. c. 28, repeals so much of the 3 & 4 Vict. as relates to actions wherein verdicts have been returned before it passed.

By 4 & 5 Vict. c. 28.—"Whereas, by an act passed in the last session of Parliament, intituled 'An Act to repeal part of an Act of the forty-third year of the reign of Queen Elizabeth, intituled 'An Act to avoid trifling and frivolous Suits in Law, in Her Majesty's Courts in Westminster', and of an act of the twenty-second and twenty-third year of the reign of King Charles the Second, intituled 'An Act for laying Impositions on Proceedings at Law; and to make further provisions in lieu thereof;' the said act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass or trespass on the case, and so much of the said act of the twenty-second and twenty-third of Charles the Second as relates to costs in personal actions, were repealed: and whereas it is expedient to remove all doubt, whether plaintiffs, in actions which had been commenced before the passing of the said act of the last session for less damages than forty shillings, may not still be entitled to their costs of suit, contrary to the manifest intention of the same; it is therefore enacted, that the said act of the last session shall be and is hereby

* The 17 Car. 2 does not apply to nonsuits. (*Faname* v. *Hill*, 4 M. & P. 113; Abridged, ante, Vol. 1, tit. *Abatement*).

repealed, so far as the same repeals, or may be deemed to repeal the said statute of the forty-third of Elizabeth, or the said statute of the twenty-second and twenty-third of Charles the Second, in respect to actions wherein verdicts had been returned before the passing of the said act of the last session."

Sect. 2—"And be it enacted, and it is hereby enacted and declared, that no plaintiff, who had, before the passing of the said act of last session, obtained a verdict for a less amount of damages than forty shillings, shall now be entitled to full costs, unless he was so entitled immediately before the passing of the said act of last session: provided, nevertheless, that if any such plaintiff shall have proceeded, since the passing of the said last-mentioned act, and before the 3rd day of May, 1841, to tax his full costs on any such verdict so obtained, for less than forty shillings, nothing in this act contained shall deprive such plaintiff of any remedy thereon, which he may now have for the recovery thereof; but it shall be lawful for such court or judge, on the application of any defendant in such action, to stay all the proceedings on such application, upon payment of such costs as such court or judge shall think fit."

MORGAN *v.* THORNE, H. T. 1841. Ex. 9 *D. P. C.* 226.

IN an action by a father as prochein amy for criminal conversation with his son's wife, the plaintiff having recovered, with leave reserved for the defendant to move to enter a nonsuit, and the defendant having applied for a certificate to deprive the plaintiff of costs, and no motion having been made to the Court for a nonsuit—

The Court held, the second section of the 3 & 4 Vict. c. 24, having repealed the 43 Eliz., c. 6, s. 2, whereby judges were empowered in certain cases to deprive the plaintiff of costs, by certifying that the damages did not amount to 40*s.*, a judge had no power by a certificate granted subsequently to deprive the plaintiff of the costs of a suit tried before the act was repealed.

And the 3 & 4 Vict., c. 24, repeals so much of the 43 Eliz., as relates to a judge granting a certificate in actions on the case and in trespass.

READER *v.* BLOOM, E. T. 1825. C. P. 3 *Bing.* 9; S. C. 10 *Moore*, 261.

THIS was an action of trespass in which the plaintiff obtained a verdict, and his costs were afterwards taxed at 70*l.* It appeared on the taxation before the prothonotary, that the person who had acted as the plaintiff's attorney in conducting the suit had ceased to take out his certificate since the year 1818, and had not been since readmitted, although all the proceedings in the cause had been carried on by him in the character of such attorney. On an application to Mr. Justice *Park* at chambers, he, on those circumstances being stated to him, ordered that all further proceedings by the plaintiff should be stayed; and that the defendant should pay the amount of the costs taxed into court, subject to a motion, as to whether the plaintiff could be entitled to them or not, or whether the whole or any part of them should be refunded to the defendant.

Per Cur.—If a plaintiff employs a person to conduct his cause in the character of an attorney who is not qualified to act as such, it does not deprive the former of his right to all his costs as against the defendant in case he obtains a verdict. The defendant's remedy is to bring the party so practising before the Court, who will deal with him according to the offence of which he may be found guilty.

The plaintiff's attorney being uncertificated does not divest the plaintiff of his right to costs*.

* See also ante, Vol. 1., tit. *Attorney*.

2. *Defendant, when entitled to**.

PROBART *v.* PHILLIPS, H. T. 1837. Ex. 5 *D. P. C.* 473; S. C. 2 *M. & W.* 40.

If the defendant's pleas cover the whole of the plaintiff's demand, he is entitled to the general costs.

IN assumpsit for work and labour, goods sold, &c., pleas as to part: first, non assumpsit; secondly, as to other part, payment; thirdly, as to another part, that the work was done under a contract, and special damage as to such part by breach of contract; fourthly, a set-off; and lastly, payment of a sum into Court; the action was referred to an arbitrator, who was to say how the verdict was to be entered on the issues joined on the four first pleas, who awarded for the plaintiff on the general issue and for the defendant on the others.

The Court held, that, the pleas covering the whole of the demand, the defendant was entitled to the general costs.

GOULD *v.* OLIVER, M. T. 1838. C. P. 5 *Bing. N. S.* 115; S. C. 6 *Scott*, 884.

But, where a plea becomes unavailable by the defendant's own act, he is not entitled to any costs.

AFTER plea of set-off the plaintiff obtained leave to amend by increasing the amount of damages, and the defendant afterwards having paid money into court, one of his pleas became unavailable.

The Court held, that, having become so by his own act, he was not entitled to the costs of such plea.

SMITH *v.* CAMPBELL, T. T. 1830. C. P. 6 *Bing.* 637; S. C. 4 *M. & P.* 469.

If several defendants defend separately and obtain a general verdict, and the costs are taxed and paid to all, one who makes no claim cannot afterwards apply for his costs.

RULE nisi that the prothonotary might review his taxation in this cause, he having allowed costs to two of the defendants only, viz. Campbell and Shouls. The circumstances of the case were as follow:—The defendants, Campbell and Shouls, joined in their defence. The defendant Cooper defended separately. At the trial the two first named defendants only appeared. Cooper being insolvent, and his attorney declining to appear for him, the defendants obtained judgment, and the two first their costs thereon.

Per Cur.—It is clear that Cooper, if he had exerted himself, had an opportunity to tax his costs as well as the other defendants. It is in vain to ask the Court to alter the judgment, for that would prejudice the plaintiffs. We have no right to make them liable a second time; we think therefore we ought not to interfere. If the defendant has any remedy, it is against his attorney.

---

3. *Of the Judge's Certificate to deprive Plaintiff of Costs.*

WRIGHT *v.* NUTTALL, H. T. 1830. K. B. 10 *B. & C.* 492.

The Judge may certify in all

THIS was an action of assumpsit, by the widow and administratrix of a sheriff's officer against an attorney, for the balance of an

* *At Common Law.*]—No costs were recoverable by the defendant at common law. (See 2 Inst. 288; Hard. 152).

By Statute.]—The Statute of Marlbridge was the first legislative enactment which conferred on the defendant a right to costs; but that act only applied to a writ of right of ward. By a variety of subsequent statutes, a defendant when he prevails is entitled to the same costs as the plaintiff would have had in case he had recovered. (See the particular heads referred to in the analysis, where the cases will be abridged and statutes referred to under their appropriate titles).

account for caption fees. The defendant pleaded the general issue, and a tender of 10*s.* 6*d.* to the plaintiff as administratrix. The plaintiff took issue upon the plea of tender. On the trial, the defendant proved that a person called on him for payment of the account; that 10*s.* 6*d.* appearing to be the balance, he paid him that sum, which was afterwards offered to the plaintiff, by her refused, and then returned to the defendant; but it turned out that the husband, the sheriff's officer, was not at this time dead, though he was confined by his last illness, and died shortly afterwards. For this reason, the defendant failed in his plea of tender to the plaintiff as administratrix. A verdict was found for the plaintiff, 10*s.* 6*d.* damages; and *Alexander*, C. B., who tried the cause, granted a certificate to deprive the plaintiff of costs. A rule having been obtained on the part of the plaintiff, calling on the defendant to shew cause why she should not be allowed her costs, notwithstanding the certificate of the Judge—

cases not within the exception in the 43 Eliz. c. 6*.

Per Cur.—A Judge, under the 43 Eliz. c. 6, is authorized to grant a certificate to deprive the plaintiff of costs, where the verdict is for less than 40*s.*, (and the action is not within the exception mentioned in the act), although the plaintiff could not have proceeded in the county court. Such a circumstance may influence the Judge in his discretion, whether he will grant the certificate; but it is no bar to his granting it where he is of opinion that the action ought not to be brought at all.

MARRIOTT *v.* STANLEY, M. T. 1840. C. P. 9 *D. P. C.* 59; S. C. 2 *Scott, N. S.* 60.

THIS was an action on the case, in which the plaintiff alleged that the defendant wrongfully and injuriously put, placed, and exposed certain ploughshares and other articles in a public highway in the town of Peterborough, whereby the plaintiff's pony was thrown down, and the plaintiff hurt. The jury returned a verdict for the plaintiff, damages 1*s.* Application was made to the Judge to certify under 3 & 4 Vict. c. 24, s. 2; but he said that he did not think the action was brought to try a right, and that it did not come under the head of wilful and malicious injuries, as it was merely a question of negligence; and he put the case of a servant carelessly leaving a

The 3 & 4 Vict. c. 24†, applies to actions of trespass and case; and if the Judge refuses to certify, the Court has no power;

* By the 43 Eliz. c. 6, (extended to Wales and the counties palatine by the 11 & 12 Will. 3, c. 9), it is enacted, that "If, in any personal action, to be brought in any of her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same Court, and be so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40*s.* or above, that in every such case the Judges and Justices before whom such action shall be pursued shall not award to the plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion." But see ante, p. 213, 3 & 4 Vict. c. 24, and 4 & 5 Vict. c. 28.

A cause partially tried, though afterwards referred, the Judge may certify. (*Nokes* v. *Frazer*, H. T. 1835, B. C., 3 D. P. C. 339).

Where, after the Judge had certified under the statute of Elizabeth to deprive the plaintiff of costs, but facts were afterwards at chambers sworn by affidavits which did not appear at the trial, the certificate ordered to be annulled. (*Anderson* v. *Sherwin*, 1836, N. P., 7 C. & P. 527).

If the Judge dies before certificate, the party is without remedy. (*Southwell* v. *Bird*, T. T. 1839, B. C., 7 D. P. C. 557).

† Abridged, ante, p. 213; and see 4 & 5 Vict. c. 28, p. 214.

cellar door open, through which a party falls and is hurt. The Master having accordingly disallowed the plaintiff's costs—

Per Cur.—We are to take it for granted, for the purpose of this application, that the damages given by the jury were the proper damages; and we have no right to assume that the party is entitled to any more. If so, the statute says that if the plaintiff, in an action of trespass on the case, shall recover, by the verdict of a jury, a less sum than 40*s.*, such plaintiff shall not be entitled to any costs unless the Judge shall certify. Here there is no certificate; and the rule must be refused.

HEAD *v.* BALDREY, E. T. 1840. Q. B. 8 *Ad. & E.* 605; S. C. 3 *P. & D.* 625.

but if a plaintiff succeeds upon one issue, and is entitled to nominal damages on the other, the Judge cannot certify to deprive the plaintiff of costs.

ON the question whether, under the 7th Rule of Hilary Term, 4 Will. 4, the Judge has power to certify to deprive the plaintiff of costs only where, upon the trial, the plaintiff fails to establish a distinct subject-matter of complaint in respect of each count—

Lord *Denman*, C. J.—Upon reading the 7th Rule of Hilary Term, 4 Will. 4, we are of opinion that that rule must be taken as one and entire; and that the latter part, which attaches the penal consequence of requiring a plaintiff to pay the whole costs, where, there being more than one count, he fails to convince the Judge at Nisi Prius that he was bonâ fide asserting two distinct causes of complaint before the Judge at chambers, and where the Judge at the trial certifies that the plaintiff did not intend bonâ fide to establish such distinct subject-matter of complaint on each count, can only be acted on in those cases to which the early part of the rule applies, viz. where the plaintiff at the trial fails to establish a distinct subject-matter of complaint in respect of each count. In the present case, no issue of fact arose out of one of the two counts in question. The plaintiff was not called on to establish that. He succeeded in one count; and there could not be a verdict against him on the other, on which he was entitled to have nominal damages without giving any evidence. It follows that the Judge had no power to grant the certificate in question, and that the Master was right in taxing the costs as if no such certificate had been given. The present rule, therefore, must be discharged.

ROBINSON *v.* MESSENGER, T. T. 1838. Q. B. 3 *N. & P.* 583.

And although a Judge certifies that the defendant had probable cause to plead a plea, the Master may refuse to allow the costs of that issue to either.

THIS was an action for the breach of the warranty of a horse, to which there were two pleas—first, that the plaintiff did not warrant the horse; second, that the horse was not unsound. The jury found a verdict for the defendant on the first issue, and for the plaintiff on the other. *Patteson*, J., afterwards certified under the 4 Ann. c. 16, s. 5, that the defendant had a probable cause for pleading the other plea. The Master, on taxation of costs, had disallowed to the plaintiff all the costs of that issue. A rule nisi had been obtained for a review of this taxation.

Per Cur.—The Rule Hilary Term, 4 Will. 4, No. 7, which gives the costs of each issue found against the party pleading it to the opposite party, does not repeal the 4 Ann. c. 16, s. 5, by which the Judge may certify that there was probable ground for pleading double pleas, and deprive the plaintiff of his costs on any such double issue.—Rule discharged.

WHALLEY *v.* WILLIAMSON, H. T. 1839. C. P. 7 *D. P. C.* 253; S. C. 5 *Bing. N. S.* 290.

If a Judge may revoke his certificate, he must do so within a reasonable time.

IN trespass, a verdict passed for the plaintiff, damages 1*s.* Baron *Alderson*, before whom the cause was tried, certified under the stat. 43 Eliz. c. 6, s. 2, to deprive plaintiff of his costs. In consequence, however, of some negotiation with the Treasury, for the purpose of procuring a mitigation of the fine or penalty which gave rise to the litigation, and of an affidavit made by the plaintiff, in February, 1837, nearly a year after the trial and the granting of the certificate, the defendant's attorney was served with a summons to attend the learned Baron, and shew cause why the certificate should not be rescinded; and finally, on the 1st day of Trinity Term, 1838, the order for rescinding the certificate was made, and notice of taxation was given by the plaintiff's attorney, on or about the 26th of May, 1837. Upon this, counsel was instructed, on the part of the defendant, to apply to the Court for a rule to rescind the order of the learned Judge.

Per Cur.—We need not decide whether a Judge has the power of rescinding at any time a certificate once given under the stat. 43 Eliz. c. 6, s. 2. If he has the power, his order for rescinding such certificate should be made within a reasonable time of the granting of the certificate, and before the rights of the defendant can be affected, and his situation changed by such recinding.

---

4. *When there shall be no more Costs than Damages.* See tits. *Assault and Battery—Trespass.*

5. *Of the Judge's Right to allow Costs at Chambers.*

DOE *d.* PRESCOTT *v.* ROE, T. T. 1832. C. P. 1 *D. P. C.* 274; S. C. 9 *Bing.* 104; S. C. 2 *M. & Scott*, 119.—S. P. HUGHES *v.* BRAND, T. T. 1833. Ex. 2 *D. P. C.* 131.

A Judge at chambers may award costs as part of his order;

IN this case, judgment had been signed, and a writ of habere facias possessionem issued and executed; and that judgment and execution had been set aside by Mr. Justice *Park*, at chambers in vacation; and the lessor of the plaintiff, at the same time, was ordered to pay the defendant his costs. Rule nisi to discharge this order as to the costs, on the ground that a Judge at chambers had no authority to award costs. (*Read* v. *Lee*, 2 B. & Ad. 415).

Per Cur.—The question raised upon this application is, whether a Judge at chambers has authority to make an order for the payment of costs by the party against whom he decides on a point brought before him on summons. The authority of a Judge at chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the Court itself; for no order which is made can be enforced by attachment, until it has first been made a rule of the Court; and the party who disputes the propriety of the order has the opportunity, as in the present instance, to question its validity by application to the Court. We see no reason why a single Judge should not make the payment of costs a part of his order; because, until such is made a rule of the Court where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose

a great hardship in many cases upon suitors, if no such powers existed. Costs are, in many cases, so important a consideration with the poorer suitor, that, if he could not obtain them at chambers, he could only make his application to the Court, and to the Court alone, at a much greater expense.

BRIDGE AND WRIGHT, *In re*, M. T. 1834. K. B. 4 *N. & M.* 5; S. C. 2 *Ad. & E.* 48.

but he should only exercise the power in extreme cases.

IN this case, the Court said, it had been resolved by all the Judges, that a single Judge at chambers has power to give costs upon a summons; but that they had also, at the same time, resolved not to exercise this power but in extreme cases.

DAVY *v.* BROWN, E. T. 1834. C. P. 1 *Bing. N. S.* 460; S. C. 1 *Scott*, 384.

And if refused, the Court will not interfere.

ON a summons before a Judge at chambers, he declined to give costs, or make any order on the subject. On motion to the Court, on the ground that costs ought to have been given—

Per Cur.—If a Judge at chambers declines giving costs, we will not entertain an application on the subject; and we must discharge the motion with costs.

---

6. *Of Double and Treble Costs*.*

CHARLESWORTH *v.* RUDGARD, H. T. 1835. Ex. 1 *C., M. & R.* 896; S. C. 3 *D. P. C.* 517; S. C. 4 *Tyrw.* 824.

Where treble costs are given by a statute, they can only be claimed by a party who has not done a thing probibited by the act.

THIS was an action of debt for a penalty of 100*l.* against the defendant, for acting as a commissioner in a matter wherein he was personally interested, contrary to the provisions of the local act, 9 Geo. 4, c. 27, s. 13. On a question as to costs—

The Court held, that clauses in an act of Parliament requiring notice of action, and giving treble costs of the defendant, where an action is commenced "for any act or thing done in execution of, or under the authority of the act," extend only to acts done under colour, and not in direct violation of the act of Parliament; and, therefore, do not apply to an action against a commissioner to recover a penalty for acting in a matter wherein he was personally interested.

* If double or treble damages are given by a statute, subsequent to the Statute of Gloucester, in a case wherein single damages were before recoverable, the plaintiff is entitled to double or treble costs, although the statute be silent respecting them. (See Sayer on Costs, 228; Hull. on Costs, 479). In some cases double or treble costs are expressly given to the plaintiff; and whenever a plaintiff is entitled to double or treble costs, the costs given by the Court de incremento are to be doubled or trebled, as well as those given by the jury. (See 2 Leon. 52; Cro. Eliz. 582; 3 Lev. 351; Carth. 297). But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. When a statute gives double costs, they are calculated thus: 1st, the common costs, and then half the common costs; if treble costs, 1st, the common costs; 2nd, half of these, and then half of the latter. (See 1 Chit. Rep. 137, n.; 2 Tidd. 1002, 7th edit). Defendants, as well as plaintiffs, are entitled to double or treble costs. (*Walker* v. *Egerton*, H. T. 1694, K. B., 1 Stra. 50).

CHARINGTON *v.* MEATHERINGHAN, M. T. 1836. Ex. 5 *D. P. C.* 313; S. C. 2 *M. & W.* 228.

So, treble costs cannot be given where party nonsuited between one act being repealed and another taking effect.

TRESPASS against a parish officer for distraining for poor-rates and highway-rates. At the trial at Northampton, at the last spring assizes, the plaintiff was nonsuited for not proving a notice of action. The Master taxed the plaintiff his treble costs. After this case had been decided, it was discovered that the trial took place a few days before the 20th of March, 1836, when, according to section 119, the 5 & 6 Will. 4, c. 50, was to come into operation; whereupon Lord *Abinger*, C. B., now delivered the judgment.

Per Cur.—We are of opinion that we cannot award the treble costs in this case. It seems to us that the treble costs are in the nature of a penalty. It does not follow that, though a party may have the right to the protection afforded him by the statute, the statute can be extended to a penalty. The statutes which give costs on a nonsuit require judgment of the term to be given. Here the trial took place before the statute was repealed; and therefore the defendant was entitled to all the protection which the law then afforded. It is not necessary to give any opinion as to what would have been the effect of a repeal of the statute before the trial.

---

7. *When Plaintiff and Defendant pay their own Costs*.*

GOODBURNE *v.* BOWMAN, E. T. 1833. C. P. 2 *D. P. C.* 206; S. C. 9 *Bing.* 667; S. C. 3 *M. & Scott*, 45.

Upon judgment non obstante veredicto, neither party are entitled to costs.

IN an action of libel, defendant pleaded the general issue, and six special pleas. Verdict for plaintiff on general issue, and one special plea; for defendant on the other five. Upon motion, judgment was entered up for the plaintiff non obstante veredicto, as the five pleas, the issues on which were found for the defendant, were bad in law. On application for costs—

The Court held, that neither party was entitled to the costs of the issues found for the defendant, on which the judgment of the Court was finally entered for the plaintiff.

---

8. *Effect of succeeding on one of several Counts†.*

A plaintiff is not liable for the costs occasioned by the delay of the Court. (*Waters* v. *Weatherby*, H. T. 1835, B. C., 3 D. P. C. 328). Where the jury are dismissed, not agreeing, each party pays his own costs. (*Waite* v. *Spurgin*, H. T. 1836, B. C., 4 D. P. C. 732). On a new trial, after a juror withdrawn on the first, the plaintiff, though he succeeds, is not entitled to the costs of the first trial. (*Thomas* v. *Lewis*, H. T. 1836, B. C., 5 D. P. C. 395). On a motion in arrest of judgment, each party pays his own costs.

† Formerly there was a distinction, as to the costs allowed on several counts, between the practice of the K. B., (*Butcher* v. *Green*, E. T. 1781, K. B., 2 Doug. 677), and C. P.; (*Bridges* v. *Raymond*, H. T. 1771, C. P., 2 Blac. 800; S. P. *Spicer* v. *Teasdale*, M. T. 1799, C. P., 2 B. & P. 49); but now it is the same in both courts, and before Rule H. T., 4 Will. 4, neither party was entitled to costs on those counts which were found for the defendant. (*Penson* v. *Lee*, 2 B. & P. 330; S. P. *Hubbard* v. *Biggs*, 16 East, 129). And the same rule obtained though there were several defendants, some of whom have suffered judgment by default. (*Morgan* v. *Edwards and Others*, H. T. 1815, C. P., 6 Taunt, 398; S. C. 2 Marsh. 201). But if a declaration contains two counts for distinct causes of

9. *Effect of succeeding on one of several Pleas*.*

10. *Effect of succeeding on all or one of several Issues.*

EYRE *v.* THORPE, T. T. 1838. Q. B. 6 *D. P. C.* 768.

Costs of issues include costs of trial.

Per Lord *Denman*, C. J.—It has been decided in several cases that the words "costs of issues" include the costs of the trial.

MILNER *v.* GRAHAM, M. T. 1833. K. B. 2 *D. P. C.* 422.

Under Rule, H. T. 2 Will. 4†, the defendant is entitled to the costs of the issue found for him‡.

BY Rule, 2 Will. 4, it is ordered, that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendants shall be deducted from the plaintiff's costs.

Park, J.—The Judges have considered that rule, and we are of opinion that the object of it, as well as its intention, is, that the defendant should be allowed his costs on all issues found for him.

See 2 *D. P. C.* 422; *Id.* 456; 10 *Bing.* 401; 1 *M. & W.* 136; 2 *A. & E.* 645; 4 *N. & M.* 341.

action, and defendant suffers judgment by default on one and succeeds on the other, the plaintiff is entitled to costs on the former, and the defendant on the latter. (*Day* v. *Hanks*, E. T. 1790, K. B., 3 T. R. 654; S. P. *Shrubb* v. *Barrett*, E. T. 1792, C. P., 2 H. Bl. 28).

By Rule, H. T. 4 Will. 4, No. 7, "Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings. And furthermore, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was bonâ fide intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge before whom the trial is had shall be of opinion that no such distinct subject-matter of complaint was bonâ fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any *costs* upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance, with respect to which the Judge shall so certify."

* By 4 Ann. c. 16, where one of several pleas is found for plaintiff, and the rest for defendant, the former is entitled to the costs of the plea found for him. See also ante, Rule 4 Will. 4, supra.

† See also Rule, H. T. 4 Will. 4, supra.

‡ Where a party, before Rule H. T. 2 Will. 4, succeeded on two trials:—Held, he was entitled to the costs of both. (*Carlisle* v. *Garland*, H. T. 1831. C. P., 9 Bing. 85; Abridged, ante, tit. *Bankrupt*).

Where some of several defendants demurred to certain counts, and pleaded the general issue as to the others, the other defendants pleading also the general issue:—Held, that pending the trial of the issues in fact, the defendants demurring were not entitled to costs of the issues in law found in their favour. (*Forbes* v. *King*, 3 Tyrw. 385).

CROWTHER *v.* ELWELL, T. T. 1838. Ex. 6 *D. P. C.* 697; S. C. 4 *M. & W.* 71.

A party is entitled to the costs of witnesses called to support issues which are found for him;

THE defendant had succeeded upon two of the issues raised in this cause, and claimed to be allowed the costs of certain witnesses in respect of them. The Master refused to allow their costs, without an affidavit of increase, to the effect "that they were material, and necessary in support of those issues, and that their evidence did not apply in any degree to the issues found for the plaintiff." The defendant tendered an affidavit, stating, that "although their evidence referred, to a certain extent, to the issues found against the defendant, still that the said witnesses were subpœnaed by the defendant, principally and specifically with the view to support the issues found for the defendant; and that such witnesses, in the judgment and belief of the deponent, spoke only generally, and not materially to the issues found against the defendant." The Master, considering this affidavit insufficient, disallowed the costs of the witnesses.

Per Cur.—We do not understand the meaning of the expression, that the witnesses were subpœnaed "specifically" with a view to the issues found for the defendant. In *Eadis* v. *Everatt*, (3 Bing. N. S. 534), it was sworn that they were subpœnaed "exclusively" for such issues. Neither is it here stated, that they were not examined in chief with reference to the other issues. And if they were used to disprove any issue that has been found for the plaintiff, how can the defendant have the costs of them? The only definite rule is that laid down in *Lardner* v. *Dick*, (2 D. P. C. 333, infra), that the defendant is not to be allowed the costs of witnesses, called as well to disprove the issues for the plaintiff, as to prove those found for the defendant.

LARDNER *v.* DICK, H. T. 1834. Ex. 2 *C. & M.* 389; S. C. 2 *D. P. C.* 333.

and of the witnesses whose testimony is solely confined to those issues*.

IN this case some issues were found for the plaintiff, and others for the defendant. On a question of costs—

The Court held, that the defendant is entitled to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him.

PERD *v.* HIGGINSON, T. T. 1837. K. B. 5 *A. & E.* 83; *overruling* COOKE *v.* SAYER, 3 *Burr.* 753; S. C. 2 *Wils.* 85; S. C. 3 *Burr.* 753.

So, the plaintiff is entitled to the costs of the issues found for him, although it appears from the whole record, the plain-

TO a declaration, containing two counts, the defendant pleaded two pleas, (one to each), on which the plaintiff joined issue; and also a plea, to which he demurred. The plaintiff made up the issues of fact, and gave a notice of trial, which a Judge refused to postpone until after the argument of the demurrer. At the trial, the plaintiff recovered a verdict, with damages on one plea, and the defendant a verdict on the other. The demurrer was subsequently

* The plaintiff is entitled to the costs of witnesses called to disprove pleas found for the defendant, though the defendant has a verdict on the general issue. (*Hart* v. *Cutbush*, H. T. 1834, B. C., 2 D. P. C. 457).

tiff had no cause of action;

argued, and judgment was given for the defendant, who thus succeeded on the whole record.

The Court held, that the plaintiff was entitled to the general costs of the cause, including the costs of the pleadings, witnesses, and trial, on the issues on which he succeeded at the trial.

GOUGENHEIM *v.* LANE, M. T. 1835. Ex. 1 *M. & W.* 136; S. C. 4 *D. P. C.* 482; S. C. 1 *T. & G.* 216.

but where the plaintiff only succeeds on one issue, he is only entitled to the costs of the witnesses called to prove it, and that part of the brief.

IN trespass against several defendants, the jury acquitted three of the defendants, and found a verdict against the other three, Lane, Barrowcliff, and Davies, on the fourth count, with one farthing damages; and on the first three counts, which were abandoned, the last three defendants had a verdict. An application was made to Lord *Lyndhurst*, who tried the cause, to certify to deprive the plaintiff of costs, but his Lordship refused to do so. On motion to review the Master's taxation—

The Court held, where there are several issues, some of which are abandoned at the trial, the plaintiff is entitled only to the costs of those parts of the brief, and such of the witnesses as were necessary for the issues on which he succeeded.

---

11. *As to Costs in the Cause.*

ROBERTS *v.* LEMON, T. T. 1838. C. P. 6 *Scott*, 5, 6.

Costs of coming to the Court, instead of applying at chambers, are costs in the cause*.

RULE nisi to set aside the service of a writ of summons for irregularity; the name of the county in which the defendant resided being omitted. It was contended, that the application ought to have been made to a Judge at chambers, and not in court.

Per Cur.—The rule may be made absolute, but the costs shall be costs in the cause.

EYRE *v.* THORPE, T. T. 1838. Q. B. 6 *D. P. C.* 768.

So, costs of opposing an unsuccessful application for a new trial,

AN application for a new trial had been refused. On a question as to the costs, it was contended that the Master ought not to have allowed the plaintiff's costs of opposing the second application for a new trial, notwithstanding his rule was discharged.

Per Cur.—The plaintiff having failed, it was proper to allow the costs of opposing the unsuccessful application for a new trial as costs in the cause in the usual manner.

PUGH *v.* KERR, M. T. 1838. Ex. 3 *M. & W.* 164.

or costs of witnesses rendered useless by a change of venue, are only costs in the cause.

AN order to change the venue was drawn up "on payment of the costs bonâ fide incurred."

The Court held, that it was conditional only, and not of obligation; and the rule being afterwards abandoned, the costs of witnesses who attended at the trial, which, but for the rule, would have been tried, were only costs in the cause. (Diss. *Maule*, B.)

* If no application at the time be made as to the costs of a new trial, they are costs in the cause. (*Truslove* v. *Burton*, 10 Moore, 96; Abridged, post, tit. *New Trial*).

12. *As to Costs of the Day.*

Walker *v.* Lane, H. T. 1835. Ex. 3 *D. P. C.* 504.

Payment of costs of the day means the same as if the record be withdrawn.

The cause was in the paper ready for trial. The defendant agreed to allow the postponement of the trial, on payment of costs of the day by the plaintiff. The cause was accordingly, by leave of the Judge, postponed; and was again put in the paper, and remained in the list three days before it was tried, when the plaintiff obtained a verdict. On taxation, it was argued for the defendant, that he was entitled, not only to the usual costs of the day, but also to the costs of the three days during which the cause was in the paper; but—

The Court held, that the defendant is entitled to no more costs than he would have been entitled to if the record had been withdrawn.

Ray *v.* Sharp, M. T. 1835. Ex. 4 *D. P. C.* 354.

On moving for such costs, it must be shewn costs were incurred.

On motion for the costs of the day as part of the rule—

Parke, B.—It is incumbent on the party applying for costs to shew that costs have been incurred: it does not appear on the affidavit in support of the motion that any costs have been incurred; and, therefore, there can be no rule.

Redit *v.* Lucock, M. T. 1834. Ex. 2 *C. & M.* 337; S. C. 2 *D. P. C.* 247.

The defendant may move for the costs of the day, though the plaintiff has obtained final judgment, and taxed his costs.

A plaintiff withdrew his record at the spring assizes, (after having given notice of trial), on account of some supposed defence which it was intimated would be set up on the other side, but at the summer assizes obtained a verdict; and since then his costs had been taxed. Final judgment was signed on the 7th November, and on the 11th the defendant moved for the costs of the day for not trying at the spring assizes.

Per Cur.—Those costs are unconnected with the judgment. The cause must be in existence; for it is not at an end till the execution is satisfied. At one time the defendant had a clear right to those costs; and we think the justice of the case requires that he should be paid them, or be allowed to set them off.

Blow *v.* Wyatt, M. T. 1838. Ex. 7 *D. P. C.* 86; S. C. 4 *M. & W.* 407.

But where plaintiff and defendant both take the record down for trial, but plaintiff withdraws his, and it is agreed to make the cause a remanet, neither

The plaintiff had entered the cause for trial at the assizes, and the defendant, who had taken down the record by proviso, had also entered it beneath the entry of the plaintiff. The cause being called on, the plaintiff withdrew his record, and it was afterwards agreed that the defendant's cause should be made a remanet. On the question, whether the defendant was entitled to the costs of the day—

Per Cur.—The ground of the application is that the defendant has lost a trial by the plaintiff's default; but that is not the case,

is entitled to the costs of the day.

for the defendant might have tried by his own record, but, instead of that, he agrees that the cause shall be made a remanet. Neither is entitled to costs of the day.

ROBINSON *v.* ROBINSON, M. T. 1834. Ex. 3 *D. P. C.* 177.

The rule is absolute in four days.

ON motion for costs of the day for not proceeding to trial—

Per Parke, B.,—(in the Exchequer). It is not a rule absolute in the first instance, nor a rule nisi in the common form; but it is a rule which, if the cause is not shewn in four days, makes itself absolute.

FRENCH *v.* BURTON, T. T. 1832. Ex. 2 *C. & J.* 634.

And after four terms, previous to moving for costs of the day, a term's notice not necessary.

A RULE had been obtained for costs of the day for not proceeding to trial pursuant to a notice of trial for Trinity Term, 1831. On shewing cause, it was submitted, that, as no proceedings had been had for four terms, the plaintiff was entitled to a term's notice.

Per Cur.—The rule only applies to cases in which the object is to speed the cause.

---

13. *As to the Admission and Proof of Written Documents.*

TYNN *v.* BILLINGSLEY, E. T. 1835. Ex. 3 *D. P. C.* 810.

No costs upon the admission of copies of public documents *.

IN case for running down a ship, tried at Newcastle, the commission-day being on the 4th March, notice of trial given on the 21st February, and a notice to admit documents served only on the 28th on the London agent, who refused to admit them, a second summons was taken out, but not attended.

The Court held, that it was too late to proceed on the 20th sect.

* By Rule, H. T., 2 Will. 4, it is ordered, "That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission."

And by Rule, H. T., 4 Will. 4, "Either party after plea pleaded and after a reasonable time before trial may give notice to the other, either in town or country, in the form thereto annexed, marked (A.), or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice within forty-eight hours to make the admission specified, the party requiring such admission may call on the party required by summons to shew cause before a Judge why he should not consent to such admission, or in case of refusal be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required whatever may be the result of the cause."

"Provided, that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly."

"Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for

of Reg. Hil. T. 4 Will. 4; but that, under the 6th Rule of Hil. T. 2 Will. 4, infra, 226, n., the documents (ship papers deposited at the custom-house at H., and copies only to be had in London) being public documents, the plaintiff was entitled to the costs of the copies of those instruments.

LEWIS *v.* HOWELL, E. T. 1837. K. B. 6 *Ad. & E.* 769.

THE execution of certain documents not having been admitted by the defendant, the plaintiff obtained the usual Judge's order that the costs of proving them on the trial should be paid by the defendants, whatever might be the event of the cause. The trial took place and the plaintiff recovered a verdict, which was afterwards set aside for irregularity without costs. Previous to a second the defendant admitted the documents.

Per Cur.—This order is right. The plaintiff is entitled to recover the costs incurred by the proof of the documents. The Judge's order was quite collateral to the issue of the cause, and cannot be affected by the result of the trial. The certificate made by the Judge at the first trial remains in force; indeed, it could only be given by the Judge who presided at that trial.

Where an admission is refused and the Judge allows the costs of proof under Rule, H. T., 4 Will. 4, a new trial being granted does not vary the right to the costs.

TINN *v.* BILLINGSLEY, E. T. 1835. Ex. 2 *C., M. & R.* 253.

A NOTICE to admit the execution of certain documents was given to the defendant's agent in London only four days before the commission-day of the assizes at which the cause was to be tried, and the defendant's agent on being applied to two days afterwards refused to admit the execution, without objecting to the sufficiency of the notice as to its having been a reasonable time before trial.

Per Cur.—The party did not assign that or any other reason for his refusal, but merely said that he would not agree to admit them. We think the justice of the case requires that the plaintiff should have the costs of proving the documents.

A notice to admit four days before the commission-day at the assizes is sufficient to entitle the plaintiff to the costs of the proofs.

---

14. *As to Witnesses.*

ANDREWS *v.* THORNTON, E. T. 1832. C. P. 1 *M. & Scott*, 670; S. C. 8 *Bing.* 431.

IN an action of slander, in which no justification was pleaded and no special damage was alleged, the plaintiff having recovered a ver-

The costs of witnesses* is in

inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit."

"If the party required shall consent to the admission, the Judge shall order the same to be made."

"No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it."

"A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order the same shall be costs in the cause."

* Upon a special case, if the defendant's plea be bad, he is not entitled to the costs of the witnesses called to support it. (*Cartwright* v. *Cock*, H. T. 1833, B. C.,

the discretion of the taxing officer.

dict, the prothonotary allowed for the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation—

And the Court held, that he had exercised a proper discretion in making such allowance.

TEMPERLY *v.* SCOTT, E. T. 1832. C. P. 8 *Bing.* 392; S. C. 1 *M. & Scott*, 601.

Hence, a party who refuses to allow a captain of a ship to be examined on interrogatories must pay his subsistence* if the Master allows it.

IN March, 1831, the plaintiff's agent proposed that the witness should be examined on interrogatories, at the same time informing the defendant that he must otherwise be detained at a considerable expense. On that communication being made, the defendant's attorney intimated that the defendant would rather run the risk of the expense than not have the advantage attending a cross-examination of the witness in court. The cause was tried in February, 1832, having been twice postponed at the instance of defendant; and on that occasion a verdict was found for the plaintiff. The prothonotary on the taxation of costs had allowed the witness 8*l.* a month for his subsistence and loss of time during eleven months, upon affidavits that he had been detained during that time and had lost an opportunity of profitable employment.

Per Cur.—The prothonotary, on taxation of costs, is justified in allowing a captain of a ship, who is a witness in the cause, expenses for subsistence according to his station for the whole time during which he is detained to give evidence.

STORY *v.* HOULDITCH, M. T. 1839. C. P. 1 *Scott, N. S.* 207.

So, the expenses of a witness from Ireland to prove the practice in the accountant-general's office is to be allowed.

IN order to prove that money had been paid out of the office of the accountant-general in Ireland to the defendant, and upon which the promises were founded, a witness was called from the office to produce the order of court and a power of attorney for obtaining the transfer.

The Court held, that being necessary to shew the practice of the office and not merely to produce the document, his expenses were properly allowed.

MORRISON *v.* HARMER, E. T. 1837. C. P. 5 *Scott*, 411; S. C. 3 *Bing. N. S.* 758.

And witnesses not being called is no ground for disallowing their expenses on taxation.†

ON the question as to the costs of witnesses who had not been called or examined at the trial—

Per Cur.—The circumstance of witnesses not being called is no ground for disallowing their expenses if the Master find that their attendance was reasonably necessary.

1 D. P. C. 529). Where many useless witnesses are called by the successful party, the Judge will cause the prothonotary to be apprized of it to guide him in his taxation of costs. (*Clark* v. *Webster*, 1823, N. P., 1 C. & P. 104).

* The allowance for witnesses is from the first day of the assizes in special jury cases. (*Cosgrave* v. *Evans*, H. T. 1834, B. C., 2 D. P. C. 443).

† But, if pleadings be altered so as to dispense with certain witnesses subpœnaed, a reasonable attempt must be made to prevent their attendance. (*Allport* v. *Baldwin*, T. T. 1834, B. C., 2 D. P. C. 599).

15. *As to Rules, and Motions, and staying Proceedings*.* See also tits. *Rules, Motions, and Orders—and Staying and setting aside Proceedings.*

M'ANDREW *v.* ADAMS, M. T. 1834. C. P. 3 *D. P. C.* 120; S. C. 1 *Bing. N. S.* 270; S. C. 1 *Scott*, 98.

Substantially failing in a rule, though it be in the alternative, deprives the party of his right to costs†.

THE defendant had obtained a rule calling on the plaintiff to shew cause why the verdict in his favour should not be set aside and a nonsuit entered, or why the damages should not be reduced. When the rule came on for argument the plaintiff did not contest the point respecting the reduction of the damages, but that respecting the nonsuit only. The Court refused to set aside the verdict, but reduced the damages.

Per Cur.—The question is, whether the plaintiff is entitled to have considered as costs in the action the costs of a rule which was in substance decided against him. If the plaintiff was obliged to come to the Court to support his verdict, the defendant was equally obliged to come to reduce the verdict to its proper amount; and the plaintiff, to entitle himself to the costs as costs in the cause, ought to have given notice to the other side that he gave up that part of the rule which he could not effectually oppose. Then the defendant would have proceeded to press the other branch of his rule at his own peril. Instead of that, however, the plaintiff gave no such notice; and only abandoned the point when he found it was not tenable. It is too much to expect that we should now give him the costs of an opposition, in which he substantially failed, as costs in the cause.

ABERNETHY *v.* PATON, T. T. 1838. C. P. 5 *Bing. N. S.* 276; S. C. 6 *Scott*, 586.

A defendant was entitled to the costs of a rule, but the plaintiff in the mean time signed judgment for want of a plea and issued execution, upon which the defendant paid the debt and costs:—The Court immedi-

THE plaintiffs' rule to enlarge a prior rule was discharged with costs, of which they paid the defendant but a small portion; and the plaintiffs signed judgment in their action against the defendant for want of a plea and duly taxed costs, and upon the taxation the defendant alleged his right to set off the costs of the rule against those of the action, but made no formal demand, and finally to avoid execution paid the entire costs, still alleging his claim; upon an application to deduct the costs of the rule from those of the action—

Per Cur.—A rule obtained by the plaintiffs to open a prior rule was discharged, with costs to be taxed by the plaintiff. The costs were taxed at 14*l.* 6*s.* 6*d.*, which costs have never been paid, except 3*l.* 7*s.* 8*d.*, the costs of a judgment which the defendant obtained an

* By Rule, H. T., 2 Will. 4, it is ordered, "That upon every bailable writ and warrant and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy, and service and attendance to receive debt and costs; and that upon payment thereof within four days to the plaintiff or his attorney further proceedings will be stayed, but the defendant shall be at liberty notwithstanding such payment to have the costs taxed; and if more than one-sixth shall be disallowed the plaintiff's attorney shall pay the costs of taxation."

† So, a party shewing cause successfully in the first instance is not entitled to costs. (*Fitch* v. *Green*, M. T. 1833, B. C., 2 D. P. C. 439).

If a rule be silent as to costs, they will be costs in the cause. (*Jeves* v. *Hay*, 1 Scott, N. C. 399; S. C. 1 M. & G. 390; *Abridged post*, tits. *Rules, Motions, and Orders*).

ately ordered the plaintiff to pay the defendant the costs of the rule.

order to set aside. In some way or other the defendant has a right to these costs. On the other hand, judgment was regularly signed by the plaintiffs for want of a plea on the 13th of July, and the costs thereon taxed on the 16th. No formal or regular demand of the 14*l.* 6*s.* 6*d.* was ever made by the defendant on the plaintiffs; but the defendant always insisted on his right to set them off against the plaintiffs' costs of the action, which the plaintiffs' attorney resisted or at least never acquiesced in, though he knew it to be claimed; and the defendant's attorney to avoid an execution paid the debt and costs to the plaintiffs, and he now applies to the Court to deduct his costs of the rule from the costs of the action, and that the plaintiffs should pay all his costs from the 14th of July, and the costs of this application. The costs of the rule are clearly due and ought to be paid. We cannot help thinking both parties in fault; the plaintiffs, because knowing of this cross-demand and that it was insisted on, they did not at once consent that it should be deducted: the defendant, because he never made a direct demand; he asked for more than he had a right to receive, and brought the party into Court upon this rather informal motion. The rule, therefore, must be absolute for the payment, by the plaintiffs or their attorney, of what remains due of the costs of the rule, but without costs.

KEEN *v.* SMITH, M. T. 1836. Ex. 5 *D. P. C.* 206; S. C. 2 *M. & W.* 85.

In K. B. and Exchequer, where the record is passed immediately after issue joined, it is discretionary with the Master to allow those costs, on a summons to stay on payment, &c.

ISSUE was joined on November 4th for the second sittings in term, which was on the 22nd. The plaintiff passed the record on the 10th; on the 11th, the defendant obtained an order to pay the debt and costs. The Master refused to allow to the plaintiff the costs of passing the record, amounting to the sum of 2*l.* 0*s.* 6*d.* On motion for the Master to review his taxation—

Per Cur.—We think this question was proper to be left to the Master's discretion, and the rule must be discharged. It appears that the practice is so in the Court of King's Bench, as well as in this Court; though in the Common Pleas the plaintiff has a right to enter his record immediately after issue is joined. It is very desirable that there should be some general rule on the subject. Rule discharged.

---

16. *As to Re-pleader.* See also tit. *Re-pleader.*

PLUMMER *v.* LEE, T. T. 1837. Ex. 5 *D. P. C.* 755; S. C. 2 *M. & W.* 501.

Neither party entitled to costs on a re-pleader.

To a declaration on an award as to accounts, alleging that there "had been a settlement in the lifetime of M. T., to wit, on the 12th day of July, A.D. 1833, which settlement was the last before making the award," the defendant pleaded, "that the day in the declaration mentioned was not the day of the last settlement before making the award;" and a verdict was found for him on that issue.

The Court held, that the allegation of the time of the last settlement was unnecessary, and the issue upon it immaterial; and as the plea contained no confession, a re-pleader was awarded, and not a judgment non obstante veredicto. On such a judgment there are no costs to either party in respect of any of the issues.

17. *Under particular Statutes.* See also tit. *Compensation.*

REX *v.* JUSTICES OF YORK, T. T. 1834. K. B. 3 *N. & M.* 685; S. C. 1 *A. & E.* 828.

BY 3 & 4 Will. 4, c. 57, s. 28, (an act improving a town), it was enacted, "That in case any jury summoned to assess the value of any premises should give a verdict or assessment for more money, as a satisfaction for the right, interest, or property of any person, body politic, &c., in or to such messuages, &c., or for any such damage or injury as aforesaid, than should have been offered by the trustees before the summoning or returning of the jury and witnesses, then the costs and expenses of the notices, precepts, and of summoning and returning the jury and witnesses, and also of the said inquest, (such costs and expenses to be settled and allowed by a justice of the peace for the said city), should be borne and paid by the trustees out of the money arising by virtue of that act, and should and might be recovered by the persons entitled thereto, by distress and sale of the goods and chattels of the trustees or their treasurer, (unless such treasurer should pay such costs and expenses), under a warrant to be issued for that purpose by any justice of the peace for the said city." The company offered for certain land 680*l.*, which the owner refused to accept. A jury was summoned, and they gave a verdict for 720*l.* On a question as to the costs—

The Court held, that a party whose property was assessed at more than the sum offered was entitled to his general costs attending the trial, but not to the expenses of surveying.

Under the words in a compensation statute, "the costs of the notices and precepts, and of summoning the jury and witnesses, and also of the inquest," the expense of surveying is not included*.

---

18. *On Entry, Writ of.* See also tit. *Right, Writ of.*

DENMAN *v.* BULL, M. T. 1824. C. P. 2 *Bing.* 387; S. C. 9 *Moore*, 745.

IN a writ of entry, the demandant took the record down to the assizes for trial; but the cause was made a remanet, and the tenant appeared at the next assizes, but the demandant did not proceed to trial.

The Court held, that the tenant could not sign judgment as in case of a nonsuit; but that costs of an interlocutory proceeding might be allowed.

On a writ of entry, costs in an interlocutory proceeding will be allowed.

---

19. *On View, Writ of.*

TAYLOR *v.* THOMPSON, H. T. 1831. C. P. 1 *D. P. C.* 218; S. C. 7 *Bing.* 403; S. C. 5 *M. & P.* 255.

RULE nisi, that the prothonotary might review his taxation in this cause as to the costs of a view which had been allowed by him. Execution had been levied, and the money paid. The motion was made on the ground that no shewer had been named by the defendant.

Lord Chief Justice *Tindal.*—The 23rd section of the stat. 6 Geo. 4, c. 50, and the practice of the Court combined, require that a

If proceedings on a writ of view be defective, it will be the same as no view, and no costs allowed.

* Under a paving act, giving the defendant costs, where a verdict is found for him, if there be several defendants, a verdict for some, and against others, the former are entitled to their costs. (*Hall* v. *Smith*, T. T. 1824, C. P., 2 Bing. 267).

shewer on each side shall be named in the writ. That was not complied with in this instance. No shewer was appointed on the part of the defendant; consequently it must be taken that he never authorized the view; and there has, therefore, been no legal view. The rule must be made absolute, and no costs allowed.

---

20. *On Venire de Novo.* See also tit. *Venire de Novo.*

EDWARDS *v.* BROWN, H. T. 1831. Ex. 1 *C. & J.* 354; S. C. 1 *Tyrw.* 281.

On a venire de novo, no costs of the first trial allowed.

ON a venire de novo, it appeared, that, by lease and release by way of mortgage, reciting that J. H. B., the mortgagor, was seised in fee tail, J. H. B. conveyed certain hereditaments, to the intent that a recovery should be suffered thereof to enure to J. E. in fee, subject to a proviso for redemption; and by bond, bearing even date, J. H. B., with two sureties, became bound to J. E., subject to a condition that, if the recovery so covenanted to be suffered should be suffered in manner and form mentioned in the said indenture of release, and so and in such manner as that under and by virtue thereof, and of the said indenture of lease and release, the hereditaments should become and be vested in the said J. E., his heirs and assigns, for ever, according to the true intent and meaning of the said indentures of lease and release, and subject to the proviso for redemption, the bond should be void.

The Court held, that the legal effect of the bond was not restrained to the suffering of a recovery merely, upon the title as disclosed, by such lease and release, but that it extended to guarantee a perfect fee to J. E., and that J. H. B. having in fact a life estate only, the bond was forfeited. Where a venire de novo is awarded, the successful party is not entitled to the costs of the first trial.

---

21. *As to Models, &c.**

22. *In the House of Lords*†.

---

23. *As to the Power of the Court to order Third Parties to pay Costs.*

HAYWARD *v.* GIFFARD, T. T. 1838. Ex. 6 *D. P. C.* 699; S. C. 4 *M. & W.* 194.

A party being really interest-

A RULE had been obtained, calling on one George Spencer to shew cause why he should not pay forthwith to the defendant the

* The expenses of models and charges of scientific persons not allowed. (*Bayley* v. *Beaumont*, 11 Moore, 497).

† Where costs are in the discretion of the court below, the House of Lords never entertain an appeal for costs; but, where the court below was by statute expressly required, in cases within the statute, to give full costs of suit, the House of Lords, declaring the case to be within the statute, remitted it back to the court below to do therein as should be just and consistent with that declaration. (*Tod* v. *Tod*, 1 Bl. N. S. 645.

sum of 112*l.* 4*s.* 3*d.*, the amount of the taxed costs on judgment as in case of nonsuit, in this cause, and also the costs of the application. The defendant Giffard was clerk to the trustees of Tothill Fields, acting under an act of Parliament for paving, lighting, and improving the district called Tothill Fields; and the other defendant, Grove, was a constable employed by the trustees in making a distress for rates, upon certain premises in the district, occupied by the plaintiff as tenant of Spencer. The distress so made was the foundation of the present action, and the affidavits alleged a variety of facts to shew that Spencer was the real plaintiff, and not Hayward, who was a pauper, and had absconded.

ed in the event of a suit, if no party, the Court cannot order him to pay costs.

Per Cur.—We cannot interfere to make a stranger to the record pay the costs of an action, though he is substantially a party to it.

(*c*) As to security for.

1.—*In general.*

FLETCHER *v.* LEW, T. T. 1835. K. B. 5 *N. & M.* 351; S. C. 3 *Ad. & E.* 551.

THE plaintiff resided out of the kingdom. The defendant was the commander of his Majesty's revenue cutter Defence, in the service of the customs. On a rule, calling upon the plaintiff to shew cause why the proceedings should not be stayed until the plaintiff should give security for the costs in the cause—

Under Rule, H.T.,2 Will. 4*, the power of the Court is discretionary†.

Per Cur.—The Court, by the 98th Rule of H. T., 2 Will. 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad.

LLOYD *v.* DAVIS, E. T. 1831. Ex. 1 *Tyrw.* 533.

MOTION for security for costs, on the mere ground of the plaintiff's residence being concealed, search having been made for him on a charge of bastardy; there being no doubt of his suing in his own right—

Concealment of residence,

The Court refused the rule.

HODSON *v.* GAMBLE, M. T. 1834. Ex. 3 *D. P. C.* 174.

RULE to shew cause why proceedings should not be stayed till plaintiff had given security for costs, or his place of residence. The affidavit on which the motion was made stated, that the plaintiff had arrested the defendant, the defendant at that time having a larger claim against the plaintiff, who had left his place of residence and

or the mere fact of the plaintiff residing at a coffee-house, is no ground for security.

* By Rule, H. T., 2 Will. 4, an application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined.

† Security does not apply to passed costs, nor will further security be required for a new trial. (*Oxenden* v. *Cropper*, H. T. 1836, B. C., 4 D. P. C. 574). So, no security allowed pending proceedings on a bail-bond. (*Bonnefor* v. *Russel*, E. T. 1837, B. C., 5 D. P. C. 555). But, an admission by the defendant of the debt is no answer to an application for security. (*Edinburgh and Leith Company* v. *Dawson*, H. T. 1839, B. C., 7 D. P. C. 573).

gone to Liverpool; and that he was in great distress there; and represented that he was about to go to Sydney to settle.

Per Gurney, B.—I cannot, under the circumstances, order security for costs, as the fact of the plaintiff's going out of the country to settle is contradicted; but he is entitled to ask for a better residence than Peel's Coffee-house; and therefore all proceedings will be stayed till a better residence is given, and no costs on either side.

ANON., M. T. 1831. Ex. 2 *C. & J.* 88.

So, if one of two plaintiffs resides in England.

IN an action, by two plaintiffs, one of whom was out of the country, motion was made for security for costs—

Per Cur.—We know of no instance in which such security was required to be given when only one of the plaintiffs was abroad. The defendant already had the security of the plaintiff in this country.

HEARSAY *v.* PECHELL, E. T. 1839. C. P. 7 *D. P. C.* 437; 5 *Bing. N. S.* 466.

And a party will not be called on to find security, on the ground that the proceedings are instigated at the instance of another;

AN action of trespass was brought against justices for turning out the plaintiff from premises claimed by the parish, as part of the poor-house, upon a warrant under 59 Geo. 3, c. 12, s. 24; the court refused to call on the plaintiff for security, on the ground that he was instigated by a party who had petitioned the House of Lords on the subject, and had declared that on public grounds he would see the plaintiff reinstated.

ROGERS *v.* BANGER, M. T. 1835. Ex. 4 *D. P. C.* 411.

but a party who absconds, removing his goods, must find security.

ON motion for security for costs, it appeared that after an arrest of a defendant, the plaintiff removed his furniture and absconded, to avoid a charge of bigamy—

The Court held, that the defendant was entitled to security for costs.

TENANT *v.* BROWN, H. T. 1826. K. B. 5 *B. & C.* 208.

So, in an action against parish officers for a distress, if collusion appears, security will be required.

IN trespass against parish officers for distraining for poor's-rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, but said nothing as to whether the attorney had indemnified him against the costs. On motion for security for costs—

The Court made the rule absolute, and staid the proceedings.

2.—*In Particular.*

1. *As to the Form of Action**.

* Security for costs is not required in ejectment, when the lessor of the plaintiff is known, of full age, and resident in this country. (*Doe* d. *Selby* v. *Alston*, M. T. 1786, K. B., 1 T. R. 491). And the same rule applies to a qui tam action. (*Field* v. *Carron*, E. T. 1792, C. P., 2 H. Bl. 27; S. P. *Golding* v. *Barlow*, E. T. 1773, K. B., Cowp. 24). A defendant in replevin will be compelled to give security for costs. (*Selby* v. *Crutchley*, H. T. 1820, C. P., 4 B. Moore, 280; S. C. 1 B. & B. 505).

2. *As to Individuals.*

1. *Persons who reside Abroad, or out of the Jurisdiction of the Court.*

MOLONEY *v.* SMITH, H. T. 1825. Ex. 1 *M'Clel. & Y.* 213.

Security for costs required, if the plaintiff resides in Ireland, and insolvency be suggested;

THE only fact disclosed by the affidavit was, that the plaintiff resided in Ireland; but, it was stated by counsel, that there was reason to doubt his solvency; that the cases were not at issue, and that the venue was laid in Middlesex.

Per Cur.—The plaintiff must find security. Proceedings stayed in the mean time.

LIMERICK AND WATERFORD RAILWAY *v.* FRASER, M. T. 1827. C. P. 4 *Bing.* 394; S. C. 1 *M. & P.* 23.

so, a joint-stock company in Ireland must find security for costs, though many of its members reside in England;

ON a rule, calling on the plaintiffs, (the Limerick and Waterford Railway Company), to shew cause why they should not give the defendant security for costs; and why, in the mean time, the proceedings should not be stayed. The motion was founded on affidavits, which stated that the company was incorporated by act of Parliament; that the action was brought against the defendant for calls; that all the works of the concern were in Ireland; that they were not possessed of any property in this country to answer the payment of costs, in case the defendant should obtain a verdict; and that security had been applied for and refused by the plaintiffs' attorney. Many of the members of the company resided in England.

Per Cur.—As this company have no property in this country that can be made available to the defendant's costs, in the event of his succeeding at the trial; or, at least, if they have at present, it is of such a nature that it might in a moment be placed beyond the reach of the process of the Court, we think the defendant is entitled to the security required.

NAYLOR *v.* JOSEPH, E. T. 1827. C. P. 10 *Moore*, 522.

and a Scotchman, only occasionally in England, must find security.

THE plaintiff was a Scotchman, not domiciled in this country, but only occasionally resident here, and having brought an action against the defendant, motion was made to stay proceedings until the plaintiff gave security for costs.

The Court held he was bound to find such security.

TAYLOR *v.* FRASER, E. T. 1834. Ex. 2 *D. P. C.* 622.

Temporary absence abroad*,

APPLICATION for security for costs, on an affidavit that the plaintiff was gone to Sierra Leone, and had been out for three months past.

* But a party who has been absent from England for one year, must find security; (*Wells* v. *Barton*, T. T. 1833, B. C., 2 D. P. C. 160); and security must be given where plaintiff resides abroad, and merely occasionally in England. (*Gurney* v. *Key*, E. T. 1835, B. C., 3 D. P. C. 559). But a lieutenant in the navy, in an English colony, is not such a foreigner as to find security. (*Evering* v. *Chiffenden*, H. T. 1839, B. C., 7 D. P. C. 536). And a party abroad, in the service of the Crown, having a residence in England, is not bound to find security. (*Nugent, Lord*, v. *Harcourt*, T. T. 1834, B. C., 2 D. P. C. 578). After plea, if the

Gurney, B.—That is not sufficient. You must shew that he is not gone for a mere temporary purpose.—Rule refused.

DOWLING *v.* HARMAN, H. T. 1840. Ex. 8 *D. P. C.* 165; S. C. 6 *M. & W.* 131.

or a residence usually abroad is not sufficient for security.

THIS was a rule calling upon the plaintiff to give security for costs. The rule was obtained on the affidavit of a party, who stated, that he believed the plaintiff to be a Frenchman, residing in Brussels, out of the jurisdiction of the Court. It appeared, however, that the plaintiff was in this country at the time of the application, and that he intended to make some stay here. It appeared also, that the defendant had obtained further time to plead on the terms of taking short notice of trial for the sittings in this term.

Per Cur.—We must abide by the rule laid down in 3 B. Moore, 78. That was the case of a party who was usually resident at Dantzic, and although he is not expressly stated to have been a foreigner, yet we think we may fairly assume that he was. That case resembles the present. We must for the sake of regularity adhere to the rule there laid down. This rule will therefore be discharged, but without costs.

Alderson, B.—The case of *Gurney* v. *Key* is exactly in point.

YOUDE *v.* YOUDE, E. T. 1835. K. B. 3 *Ad. & E.* 311.

But, where the assignee of a bond sues in the name of the obligee, resident abroad, security must be given*.

IN an action brought upon a bond in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant applied for security for costs from the nominal plaintiffs, the assignees, who gave a written undertaking.

The Court held the undertaking not sufficient, and that the plaintiff must find security.

---

2. *Bankrupts*†.

MASON *v.* POLHILL, E. T. 1833. Ex. 1 *C. & M.* 620; S. C. 2 *D. P. C.* 61; S. C. 3 *Tyrw.* 595.

If the assignees proceed with the action in the bankrupt's name security for costs will be required.

THE plaintiff brought this action, which was for pirating the opera of "Robert le Diable," in Easter Term, 1832; and the cause stood for trial at the sittings after Trinity Term of that year. In consequence of some negotiations the notice of trial was countermanded, and in November the plaintiff became bankrupt. His assignees proceeded with the action against his consent, and gave notice of trial before the present term for the first sittings in term; but the

declaration be amended, a foreigner must find security. (*Greece, King of*, v. *Wright*, M. T. 1837, B. C., 6 D. P. C. 12). The affidavit must not only state that the defendant has gone abroad, but that it is permanent. (*Frodsham* v. *Myers*, M. T. 1835, B. C., 4 D. P. C. 280). An affidavit, stating "belief" that the plaintiff resides abroad, is insufficient. (*Sandys* v *Hohler*, H. T. 1838, B. C., 6 D. P. C. 274).

* In a prior case it was held, that the assignee of a debt abroad will not be called on to give security. (*Day* v. *Smith*, T. T. 1832, B. C., 1 D. P. C. 460).

† Where the plaintiff's bankruptcy intervenes after verdict for him, but a new trial granted, he must find security. (*Denton* v. *Williams*, M. T. 1839, B. C., 8 D. P. C. 123.

cause was not tried. After the first sittings a rule was obtained, calling upon the assignees to give security for costs.

Bayley, B.—As the assignees are to receive the benefit of all the proceedings, they ought to give security for all the costs. With respect to the lapse of time, on a motion to set aside proceedings for irregularity, a party may be too late as he comes to ask a favour, but here it is a matter of right that is asked.

WALKINSHAW *v.* MARSHALL, T. T. 1835. Ex. 4 *Tyrw.* 993.

In another case it was held, that a bankrupt is not bound to give security for costs until it is ascertained that the assignees proceed with the action.

IN this case it was decided that where the plaintiff becomes bankrupt, the defendant cannot move for security until it is ascertained that the assignees intend to proceed; and where the plaintiff was under the usual terms, and might have gone to trial at the sittings after Michaelmas, and on the 10th of January appeared in the Gazette, and issue was delivered on the 29th:—Held, also, that an application for security on the 31st was made in time.

BECKHAM *v.* KNIGHT, M. T. 1837. C. P. 6 *D. P. C.* 227; S. C. 4 *Bing. N. S.* 74; S. C. 2 *Scott*, 336.

But after joinder in demurrer, bankruptcy is no ground for security if the assignees refuse to interfere.

THE action was commenced in January, and on the 28th of that month a declaration was delivered. The defendant demurred to the declaration on the 21st of February, and there was a joinder in demurrer on the 6th of April; subsequently, in the month of June, the plaintiff became bankrupt, but obtained his certificate on the 23rd of September, before the commencement of the present term. On motion for security for costs—

Per Cur.—After an issue in law has been joined in the action, the plaintiff becomes bankrupt; and not until after he has obtained his certificate is any application made to the Court for security for costs. It might be that if the case rested there, the parties would have been obliged to give security; but there is another circumstance, namely, that it is denied that the assignees will come in and interfere with the action. It seems to us, then, to be a case which may be considered to be within the circumstances and principle of *Snow* v. *Townsend*, as reported in 1 Marshall, 477. The assignees having declined to sue, the Court refused to set aside the proceedings in the action, or to compel the plaintiff to give security for costs.

ROPER *v.* PHILLIPS, M. T. 1828. K. B. 3 *M. & Ry.* 84.

A bankrupt at Calais, who is expected to return, is not bound to find security;

ON motion for security for costs, it appeared that the defendant had gone to reside at Calais in July, 1828; that in consequence thereof, a commission of bankruptcy had issued against him, whereupon he had been duly declared a bankrupt; that the defendant was the sole assignee; that the plaintiff had not surrendered to his commission, and was still residing at Calais.

Per Cur.—It would be a great hardship to require security for costs from a plaintiff who cannot have the means of indemnifying the parties who should enter into such an engagement for him. In the present case there appears to be good reason for supposing that the plaintiff's residence at Calais is of a temporary nature. It appears that he has been taking proceedings to enlarge the time for

his surrender; and probably he will be in this country in a few days, as it cannot be presumed that he will be guilty of a felony.

DOE *d.* COLNAGHI *v.* BLIGH, T. T. 1837. C. P. 5 *Scott*, 714.

and the lessor of the plaintiff being a bankrupt is no ground for security.

ON motion for security for costs, it appeared that the lessor of the plaintiff in ejectment had become bankrupt, and was uncertificated.

The Court held that event no ground for compelling him to give security, although the assignees had declined to proceed in the action, and it was carried on for his benefit.

WRAY *v.* BROWN, H. T. 1840. C. P. 8 *D. P. C.* 279; S. C. 6 *Bing. N. S.* 271.

So, the assignment of a debt is not a ground for security, though the assignor had been a bankrupt and an insolvent.

THIS was a rule calling upon the plaintiff to shew cause why he should not give security for costs. It was obtained on affidavits, which stated that the action was brought to recover the sum of 52*l.* 10*s.*, the amount of a promissory note made by the defendant, payable to the plaintiff two years after date; that the plaintiff had been a bankrupt once, and had been discharged three times under the Insolvent Debtors' Act; that he had no interest in the note, but that the action was brought for the benefit of one Thomas Fether, who appeared, from the schedule filed by the plaintiff upon his last discharge, to be the holder. The defendant also swore that, as he believed and was advised, there was a good defence to the action on the merits; and that, unless he obtained security for costs, he would not recover his costs, if successful.

Per Cur.—It is a fixed rule of law, that the bringing of an action for the benefit of another to whom the plaintiff has assigned the subject-matter of the action is not a sufficient reason to induce the Court to require security for costs. Here, the party applying for the rule has added as another reason, that the plaintiff had taken the benefit of the Insolvent Debtors' Act; but this was before the action was brought, and consequently the case does not fall within the principle contended for, as appears from the authority which has been referred to. (7 Moore, 344). The question is, not whether the insolvent suing, and the party interested, are in the same situation or predicament, but whether the Court would be justified in calling for security for costs in a case like the present, and *Morgan* v. *Evans* decides and answers in the negative. It has been said, that the assignees should give security, inasmuch as they would be entitled to the surplus, but it does not appear from the affidavit that there will be any surplus. In fine, it would, we think, be most unjust to call upon the party to give security for costs.

MANLEY *v.* MAYNE, M. T. 1828. K. B. 3 *M. & Ry.* 381.

If a bankrupt finds security for costs, the terms will be, defendant shall not plead his bankruptcy.

ON motion for security for costs, it appeared that the plaintiff having become bankrupt after declaration and before plea, and the action being continued for the benefit of the assignees—

Bayley, J.—It would be unreasonable, that the defendant should obtain security for costs on the ground that the action is prosecuted, not by the plaintiff himself, but by his assignees, and then turn the plaintiff round on an objection which is personal to the plaintiff

3. *Executors and Administrators*.*

4. *Husband and Wife†.*

---

5. *Infants.*

DOE *d.* ROBERTS *v.* ROBERTS, E. T. 1838. Ex. 6 *D. P. C.* 556.

RULE calling on the lessor of the plaintiff to give security for costs on the ground of infancy. (*Doe* d. *Selby* v. *Alston*, 1 T. Rep. 491).

An infant pauper in ejectment must find a lessor instead of John Doe.

The Court discharged the rule, on the terms that the infant's father should be substituted for John Doe.

MANN *v.* BERTHEN, E. T. 1830. C. P. 4 *M. & P.* 215.

APPLICATION was made on the part of the defendant, that the plaintiff, an infant, should give security for costs, or that the appointment of guardian might be disallowed, on the ground that he was an irresponsible person, and made guardian for the purpose of fraud.

If insolvent an infant who sues by guardian, must find security for costs‡.

The Court ordered security to be given.

---

6. *Insolvents.*

ELLIOTT *v.* KENDRICK, M. T. 1840. Q. B. 9 *D. P. C.* 195; S. C. 4 *P. & D.* 306.

THE plaintiff had assigned his estate to trustees for the benefit of creditors, and afterwards became insolvent and bankrupt. The trustees brought an action for a debt due to the plaintiff prior to the assignment. The defendant claimed a large sum, which he was willing to set-off, and contended that the party was merely the nominal plaintiff.

If the trustee of an insolvent sues in the latter's name, he must find security §.

The Court held, that, under these circumstances, the defendant was entitled to security for costs from the trustees, but was not entitled to plead a release from the plaintiff.

CLAPWORTHY *v.* COLLIER, T. T. 1832. Ex. 2 *C. & J.* 631.

TROVER for oranges. The plaintiff having applied to the Court for the relief of insolvent debtors, was remanded by that Court to

But an insolvent entitled to

* Executors or administrators residing abroad are bound to give security for costs. (*Chevalier* v. *Finnis*, T. T. 1819, C. P., 1 B. & B. 277).

† The wife cannot use her husband's name without his consent; and proceedings will be stayed, unless security be found. (*Harrison* v. *Almond*, M. T. 1835, B. C., 4 D. P. C. 341).

‡ In a former case it was held, that an infant is not bound to give security for costs, on the ground that the prochein ami is insolvent. (*Anon.*, M. T. 1813, C. P., 1 Marsh. 4; S. P. *Yarmouth* v. *Mitchell*, H. T. 1823, K. B., 2 D. & R. 423).

§ But the assignees of an insolvent debtor are not bound to find security. (*Andrews* v. *Marris*, T. T. 1839, B. C., 7 D. P. C. 712).

subsequently acquired property will not be called on to find security, unless an order has been made to pass the property to the assignees.

prison for three years; after he was so remanded, his wife, as was stated in her affidavit, was supplied by defendant with a sum of money to enable her to continue carrying on a fruiterer's shop, with which money she purchased the oranges in question. The defendant had obtained possession of them, and he delivered them to the plaintiff's assignees. A rule to shew cause why the plaintiff should not give security for costs having been obtained—

Per Cur.—In an action to recover property acquired subsequently to adjudication, the Court will not direct the insolvent to give security for costs, unless the Insolvent Debtors' Court, on an application by the assignees under 7 Geo. 4, c. 57, s. 57, have permitted execution to issue in respect of such property.

---

7. *Kings, Foreign.*

EMPEROR OF BRAZIL *v.* ROBINSON, E. T. 1837. K. B. 5 *D. P. C.* 522; S. C. 1 *N. & P.* 817.

A foreign king residing out of this country must find security.

ON the question, whether a foreign potentate plaintiff was bound to find security for costs in a cause arising out of commercial transactions—

Per Cur.—The emperor appears to have engaged in a commercial transaction, and to be resident out of the jurisdiction. We see no reason, therefore, for exempting him from the necessity of finding security for costs to which any other person bringing such an action would be subjected.

---

8. *Lunatics**.

9. *Peers*†.

EARL OF FERRERS *v.* ROBINS, E. T. 1834. Ex. 2 *D. P. C.* 636.

A peer is not bound to give security for costs, though resident abroad.

A RULE to shew cause why the plaintiff in this action, who was a peer of the realm, should not give security for costs, had been obtained, on the ground that he was residing abroad.

The Court held, that the plaintiff was not liable to be called upon to give security.

---

10. *Prisoners*‡.

* Lunacy forms no ground for security for costs. (*Steel* v. *Allan*, E. T. 1801, C. P., 2 B. & P. 437).

† But in equity, a peer, out of the jurisdiction, held not exempt from the liability to give security for costs. (*Lord Aldborough* v. *Burton*, 2 M. & K. (Ch.) 401).

‡ The fact of a plaintiff being imprisoned in Newgate, (*Anon.*, T. T. 1809, C. P., 2 Taunt. 61), or being a prisoner of war, (*Maria* v. *Hall*, T. T. 1800, C. P., 2 B. & P. 236), or an English subject imprisoned in France, is no ground for requiring security for costs. (*Tullock* v. *Crowley*, M. T., 1807, C. P., 1 Taunt. 18).

11. *Seamen*.*

12. *Poverty.*

HESKETT *v.* BIDDLE, E. T. 1835. C. P. 3 *D. P. C.* 634.

Mere inability to pay debts no ground for security in replevin.

RULE calling on the defendant in replevin, to shew cause why he should not give security for costs. The application was made under the following circumstances:—In 1828, the landlord of the premises in question mortgaged his property; in 1830, he agreed that the mortgagee should receive the rents, and the tenants attorned to the mortgagee; in 1834, the mortgagor took the benefit of the Insolvent Debtors' Act, and he afterwards levied a distress on the mortgaged premises for a quarter's rent. The plaintiff replevied, and when the cause was about to be tried in the county court of Middlesex, the defendant removed the suit by the writ of re. fa. lo.: both defendant and the broker who levied the distress were described to be in a state of indigence and poverty.

Per Cur.—The mere poverty of the defendant, who has removed a plaint in replevin, is no ground for compelling him to give security for costs.

GREGORY *v.* ELDRIDGE, M. T. 1833. EX. 2 *C. & M.* 336; S. C. 2 *D. P. C.* 259.

And, in a qui tam action, being indigent and other actions brought, no ground for security.

ON motion for security for costs, it was sworn that this and many other actions had been brought by the same plaintiff and the same attorney; that they were qui tam actions for the recovery of penalties for keeping unlicensed places for dancing, music, &c.; and that the plaintiff was a man of straw, who lived in lodgings of 2*s.* a week, and would not be able to satisfy the costs of the actions if he failed in them.

The Court refused the rule, because there was no instance of such an application in a qui tam action.

BALL *v.* ROSS, M. T. 1840. C. P. 1 *Scott, N. C.* 217; S. C. 1 *M. & G.* 445.

But a needy plaintiff must find security if the action be carried on at the instance of another party.

ON motion for security for costs, it appeared that the plaintiff was in very poor circumstances, and the tenant of a party carrying on the action at his own expense.

The Court made an order on the plaintiff and such party for security for costs.

3.—*Application for, when and how made.*

1. *How made.*

ADAMS *v.* BROWN, T. T. 1832. C. P. 9 *Bing.* 87.

A party ought to be applied to

IN an answer to a motion for security for costs, it was objected, that no previous application had been made to the plaintiff for secu-

* Where a suit is instituted by a foreign seaman on board an English ship, the Court will not stay proceedings till he gives security for costs; (1 B. & P. 96); nor will the Court compel security for costs from a foreigner who commands a vessel which is constantly sailing to and from the ports of England. (2 Taunt. 253).

for security for costs before a rule is obtained;

rity, which, on the authority of *Bass* v. *Clive*, (3 Mau. & Sel. 283), should have been made.

Per Cur.—As this rule is, in effect, an application for a stay of proceedings until security is given, we think it the better practice that an application should be made to the party before coming to the Court.

JONES *v.* JONES, H. T. 1832. Ex. 2 *C. & J.* 270; S. C. 2 *Tyrw.* 216.

and if not applied for, it is a rule nisi* only, and no stay of proceedings.

BEFORE notice of motion, or any application made for security for costs to the plaintiff's attorney or agent, on an affidavit stating that the plaintiff resided abroad, out of the jurisdiction of the Court, a rule had been obtained to shew cause why the plaintiff should not give security for costs, and in the mean time proceedings be stayed—

Bayley, B.—I am surprised that the officer should have drawn up the rule on the terms, that proceedings be stayed, without any statement in the defendant's affidavit, that an application for security for costs had been made, or that a notice of motion had been given.

HUNTLEY *v.* BULMER, H. T. 1839. C. P. 6 *Scott*, 247.

The affidavit in support of a motion for security must shew in what stage the proceedings are.

ON motion for security for costs—

The Court held, that the affidavit on the motion for security must show the stage in which the proceedings are.

COLE *v.* BEARDY, T. T. 1836. Ex. 5 *D. P. C.* 611; S. C. COLE *v.* PERRY, T. T. 1837. Ex. 1 *T. & G.* 1000.

If not, a rule nisi only will be granted.

THE affidavit in support of a motion for security for costs stated that the plaintiff resided at New York—

Alderson, B.—Does the affidavit show in what stage the proceedings are? If not, I can only grant a rule nisi for security.

KEMBLE *v.* MILLS, T. T. 1840. C. P. 8 *D. P. C.* 836; S. C. 1 *Scott, N. S.* 402; S. C. 1 *M. & G.* 565.

The Court will make a conditional rule as to security for costs†.

IT appeared from the affidavit on which the rule had been obtained, that the cause had been set down in the demurrer paper in the month of January, 1840, for argument, and that since that time the plaintiff had gone to reside in Australia. It was now argued that the only object which the defendant had in making this motion must be to prevent the cause from being heard; the greater part of the costs likely to be incident to the suit had been already incurred, and it would be hard upon the plaintiff now to stop the further progress of his action.

The Court directed that, in the event of judgment being given in favour of the plaintiff, the proceedings should be stayed until security for costs was given.

* Rule for cannot be moved the last day of term. (*Gronow* v. *Pointer*, E. T. 1835, B. C., 3 D. P. C. 571).

† As to find security, or defendant to sign judgment as in case of a nonsuit. (*Kelly* v. *Brown*, M. T. 1836, B. C., 5 D. P. C. 264).

2. *When to be made.*

KASTEN *v.* PLAW, M. T. 1827. C. P. 1 *M. & P.* 30.

Before Rule, H. T. 2 Will. 4, an application for security must have have been made before plea*;

AFTER plea a rule was obtained to shew cause why the proceedings should not be stayed until the plaintiff gave security for costs. The affidavit stated that the plaintiff was a foreigner, the master of a vessel, in the habit of trading to and from the ports of Germany and London, and that he had no fixed residence in this country.

Per Cur.—The secondary says that this motion should have been made before plea. We are also of opinion that on the other ground this rule cannot be supported. The case of *Nelson* v. *Ogle* is precisely in point, and that of *Darrell* v. *Matheson* is altogether different; for there the plaintiff was shewn to be resident in this country during four months of the year.

WILSON *v.* MINCHIN, M. T. 1831. Ex. 2 *C. & J.* 87; S. C. 2 *Tyrw.* 166.

or time to plead obtained;

THE day after an order for a week's time to plead, a rule was obtained to shew cause why proceedings should not be stayed until the plaintiff gave security for costs.

Bayley, B.—If the defendant had pleaded he would have come too late; but the principle of that rule is that the Courts will not suffer the party to incur the expense of a plea pleaded, and then call upon him for security for costs.

DOWLING *v.* HARRISON, H. T. 1840. Ex. 8 *D. P. C.* 165; S. C. 6 *M. & W.* 131.

but now it may be made before issue joined.

THIS was a rule calling upon the plaintiff to give security for costs. The rule was obtained on the affidavit of a party, who stated that he believed the plaintiff to be a Frenchman, residing in Brussels, out of the jurisdiction of the Court. It appeared, however, that the plaintiff was in this country at the time of the application, and that he intended to make some stay here. It appeared also that the defendant had obtained further time to plead on the terms of taking short notice of trial for the sittings in this term.

Per Cur.—This case must be governed by the 18th Rule of Hilary Term, 2 Will. 4, which runs thus:—"An application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined." The present case is an "ordinary one;" the fact of the defendant being under terms at the time of the trial does not take it out of this rule. The rule was made to correct a diversity in the practice of the Courts as to this subject.

BOHRS *v.* SESSIONS, T. T. 1834. Ex. 2 *D. P. C.* 710.

It is too late after judgment for want of a plea†.

ON motion for security for costs, it was objected that the application was too late, not having been made till the last day for pleading, and judgment having been signed for want of a plea—

Parke, B.—If judgment is properly signed the application is too

* If defendant knew plaintiff was abroad. (*Brown* v. *Wright*, T. T. 1831, B. C., 1 D. P. C. 95).

† Or after issue joined on an information. (*Rex* v. *Day*, H. T. 1831, B. C., 1 D. P. C. 32).

late, but the rule may stand over till the next day to produce an affidavit as to when and how the judgment was signed.

WAINWRIGHT *v.* BLAND, M. T. 1835. Ex. 2 *C. M. & R.* 740; S. C. 4 *D. P. C.* 547; S. C. 1 *T. & G.* 37.

And where a new trial is granted after the jury have been discharged on a former, it is too late to apply for security.

AFTER a trial in which the jury not agreeing in their verdict were discharged by consent of the parties, the plaintiff having given fresh notice of trial the Court refused to stay proceedings until the plaintiff had given security for costs, on an affidavit stating that he was resident abroad and not likely to return; it appearing that he had gone abroad, and that the defendants had been fully acquainted with that fact before the trial. The rule is, that "the application to compel the plaintiff to give security for costs must in ordinary cases be made before issue joined." If it be made after that time, the Court must be satisfied that the defendant did not know previously of the residence abroad. This is the mode in which they exercise their discretion. It is not a question as to whether one side may or may not recover the costs from the other.

4.—*Effect of Order for*.*

5.—*As to further Security, and new Sureties†.*

PIZANI *v.* LAWSON, E. T. 1839. C. P. 5 *Scott*, 418.

After security found, the Court will not increase the amount—

THE Court refused, in an action of libel, to increase the amount of security, on the ground of the sum ordered (400*l.*) being inadequate to cover the expected expenses of foreign witnesses, &c.

KENT *v.* POOLE, H. T. 1839. K. B. 7 *D. P. C.* 572.

on the ground that witnesses reside at Edinburgh;

IN an action on a note, a motion was made requiring the plaintiff to give security for costs, to the satisfaction of the Master. That officer fixed the amount of security at the sum of 6000*l.* Another application was made to increase the amount of security. The affidavit on which the application was founded, stated that, on behalf of the defence, no less than seventy-one witnesses would be required to give evidence in the cause. Twelve of them resided at Edinburgh, seven at Perth, and two at Boulogne.

Patteson, J.—The witnesses may be examined at half the expense on interrogatories, and that is a good reason for granting a commission to examine them; but it is no reason for granting this rule.

ALEVEN *v.* FURNIVAL, H. T. 1834. Ex. 3 *C. & M.* 555; S. C. 4 *Tyrw.* 370.

or plaintiff nonsuited,

THIS was an action upon the decree of a French court, wherein, pursuant to a former rule, the Master had directed that the plain-

* If, pending a treaty for security for costs, the plaintiff signs judgment for want of a plea, the Court will set it aside. (*Drury* v. *Johnson*, E. T. 1824, Ex., 13 Price, 489). It was ordered that after security given defendant have seven days' time to plead; in the mean time he craved oyer:—Held, that the time ran from the granting oyer. (*Cahill* v. *M'Donald*, 4 A. & E. 1004; abridged, post, tit. *Plea*).

† The sureties becoming insolvent is no ground for new sureties. (*Jones* v. *Jacob*, H. T., 1834, P. C., 2 D. P. C. 442).

tiffs, who were foreigners and resided in France, should give security for costs, to the amount of 150*l.* On the trial of the cause, the plaintiffs were nonsuited, with liberty to move to enter a verdict. After a rule to shew cause why a verdict for the plaintiffs should not be entered, or a new trial had, application was made to shew cause why it should not be referred to the Master to direct further security, and why proceedings should not be stayed, until such security was given.

and a new trial granted.

Per Cur.—The rule that security for costs cannot be obtained after issue joined, extends to an application for a reference to the Master to direct further security, where the amount for which security has been given in the first instance is insufficient to satisfy the costs which have been incurred by the defendant.—Rule refused.

DE ROSSI *v.* POLHILL, T. T. 1840. C. P. 7 *Scott*, 836.

IN this case the Court would not, even in a cause of great delay, withhold a commission to examine witnesses abroad, where the object was to try the cause with effect, but referred it to the Master, whether the amount of the security ought to be increased.

But a commission to examine witnesses abroad, is a ground for further security.

6.—*As to exonerating the Sureties.*

BADNALL *v.* HALL, M. T. 1838. Ex. 7 *D. P. C.* 19; S. C. 4 *M. & W.* 535.

A PLAINTIFF had been compelled to give security for costs, on account of his residence abroad. On motion that the security be cancelled, on the ground that the plaintiff had returned to England—

A surety cannot apply to be relieved, because the plaintiff has returned to England.

Per Cur.—The plaintiff commences an action under such circumstances that the Court impose upon him certain terms; surely those terms must last while the suit goes on. It is very possible that this may be a fraudulent return, in order to get rid of the bond.

(*d*) AS TO THE TAXATION OF.—See also tit. *Attorney.*

1. *Of the Notice to Tax.*

EDMUND *v.* CATES, T. T. 1838. Ex. 6 *D. P. C.* 667; S. C. 4 *M. & W.* 66.

MOTION to set aside the taxation of costs. Notice of taxation was given after eight o'clock P. M., on Friday, for twelve o'clock next day. It was submitted, that this was not "one day's notice," within the Rule, Trinity Term, 1 Will. 4. But—

Notice to tax given before nine o'clock at night is good, under Rule, T. T., 1 Will. 4*, for the next day.

The Court said, that such a notice, given at any time before nine o'clock P. M., of one day, was good for the following day; and therefore rule refused.

* By Rule, T. T., 1 Will. 4, it is ordered, that, before taxation of costs, one day's notice shall be given to the opposite party. But, by Rule, H. T., 4 Will. 4, it is ordered, that notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general Rule of Trinity Term, 1 Will. 4, s. 12.

PERCY *v.* TURNER, M. T. 1831. Ex. 2 *C. & J.* 93.

The rule as to one day's notice to tax, is discretionary with the Court;

IN this case the Court said:—The Court has required that one day's notice shall be given; but, what consequence shall attach to the neglecting to do so, is not distinctly stated in the new rule. It might by possibility be, that in some cases the Court would set aside the judgment as an irregularity, and in others exercise a discretion as to the course they would take under the circumstances of the particular case.

BUNTS *v.* POYNTER, H. T. 1838. Ex. 6 *D. P. C.* 387; S. C. 3 *M. & W.* 310.

and unless the defendant has appeared, need not be given*.

ON shewing cause against a rule for the Master to review his taxation, which had been obtained on the ground, (amongst others), that no bill of costs had been delivered prior to taxation, the defendant had not appeared to the action, and it was argued, that, as in such a case, by Rule, Hil. T., 4 Will. 4, c. 117, no notice of taxation was necessary, it could not be necessary to deliver a bill of costs.

Per Cur.—The rule of this Court, in its terms, applies only where there is some attorney of the party, whose costs are to be taxed. It also requires a bill of costs, to be delivered at the time of serving the notice of taxation. In its terms, therefore, that rule can hardly be said to apply to a case where there has been no appearance, or recognised attorney, and where no notice of taxation need be served. But, independently of that, it is clear that the rule abrogates the necessity of delivering a bill of costs before taxation.

BLAKE *v.* WARREN, H. T. 1840. Ex. 8 *D. P. C.* 173.

A notice to tax at Westminster in term is good.

DURING term time the plaintiff gave notice to tax at Westminster. On the morning of that day, the defendant's attorney sent a notice that he objected to attend at Westminster, whereupon the Master proceeded ex parte, and execution subsequently issued.

The Court held the notice good, and said, during the sitting of the Court, the Masters are properly here, and the practice is to attend them here.

THORPE *v.* WORTHY, E. T. 1832. Ex. 2 *C. & J.* 488; S. C. 2 *Tyrw.* 489.

The expense of the notice of taxation is to be allowed in costs†.

THE defendant, when residing at Exeter, having given a cognovit, without employing any attorney, the plaintiff signed judgment, and inclosed a notice of taxation to an attorney at Exeter, to be served on the defendant. The defendant having left Exeter, the notice was forwarded to an attorney at Torrington, who sent a person on horseback five miles from that place to make the service. The charge made (including postage, journey, horse-hire, and letter to plaintiff's agent) was 1*l.* 12*s.*; but the Master, on taxation, considering that a notice by the post would have been sufficient, allowed only for a letter to Exeter.

Bayley, B.—We think that the Master should allow such expense as has been reasonably incurred in serving the notice, in a manner

* By Rule, H. T., 4 Will. 4, ante, p. 245.

† The omission to give notice to tax, is not a sufficient ground to set aside the judgment, &c. (*Lloyd* v. *Kent*, T. T. 1836, B. C., 5 D. P. C. 125).

most likely to enable the party to have the notice, and to attend the taxation. The notice ought undoubtedly to be given with the least possible expense. If the party lives in the town, it may be fit that he should have only a letter; but if he resides at a distance, the expense of sending over a man for the purpose of serving him with the notice, is, I think, not unreasonable.

---

2. *Of the Power of the Taxing Officer, and the Course he is to pursue on Taxation.*

Roe *v.* Cobham, E. T. 1838. C. P. 6 *D. P. C.* 628; S. C. 6 *Scott*, 146.—S. P. Head *v.* Baldrey, T. T. 1839. Q. B. 8 *A. & E.* 605.

A sum of money had been offered to a plaintiff in satisfaction of his demand, which he declined to accept; but subsequently, on its being paid into Court, with a plea of such payment, he took it out.

The Court will not interfere to give the defendant his costs, or point out the mode of taxation, unless defendant has been before the Master.

The Court will not prospectively order in what manner particular costs are to be taxed.

Milton *v.* Rawlings, H. T. 1836. K. B. 4 *D. P. C.* 576.

Matters had been referred to the Master, but he had no discretion as to costs. On motion to confirm his report—

Per Patteson, J.—I can only grant a rule nisi. Had the Master been invested with a discretion as to costs, the rule for confirming the Master's report would have been drawn up on the mere production of the report at the rule office.

Upon reference to the Master, without a discretionary power, his report must be affirmed in order to obtain the costs.

Fairlie *v.* Parker, E. T. 1838. C. P. 1 *Moore & P.* 438.

In an action brought to recover the balance of an account, the parties agreed that it should be referred to arbitrators, to ascertain the amount of the balance; the arbitrators to be guided in their award by the decision of the jury in regard to a certain cargo of cotton, which formed one of the items of the account; and it was agreed that, if the jury should find that the plaintiffs had no claim in respect of that cargo, the verdict on the trial was to be taken for the defendants, otherwise, for the plaintiffs; with power, nevertheless, for the arbitrators to direct the verdict to be entered for the plaintiffs, if they should find a balance due to them. The jury found that the plaintiffs had no claim on the defendants for the value of the cargo in question; and the arbitrators awarded that 1,230*l.* 14*s.* 6*d.* were due from the defendants to the plaintiffs, and directed the verdict to be entered for the latter for that sum. On taxation, the prothonotary refused to allow the plaintiffs those costs which were applicable to the cotton.

The Court held that such disallowance was right.

Where the arbitrator's decision is to be guided by the verdict, the prothonotary, on taxation, must adopt the same course.

Bucknall *v.* Boydell, M. T. 1839. C. P. 7 *Scott*, 171.

On a rule to shew cause why the Master should not review his taxation of costs, it appeared that the Master had allowed only half

The amount of costs to be al-

lowed, where briefs have been hastily prepared, is in the discretion of the Master.

the charge for preparing briefs, conceiving them to have been hastily prepared for the sake of costs.

The Court refused to interfere.

ELVIN *v.* DRUMMOND, M. T. 1827. C. P. 4 *Bing.* 415; S. C. 1 *Moore & P.* 88.

A cognovit for £——, "and such costs as the prothonotary should think fit," the decision of the prothonotary is final.

THE plaintiffs were nonsuited, and obtained a rule for a new trial, in which no mention was made of costs; and the defendant not wishing to go down again to trial, gave them a cognovit in this form:—"I hereby confess this action, and that the plaintiffs have sustained damages to the amount of 1*s.*, besides their costs, to be taxed by the prothonotary, and he shall think the plaintiffs entitled." The prothonotary having refused to tax the plaintiffs the costs of the nonsuit, on motion for the prothonotary to review his taxation—

Per Cur.—The prothonotary was made arbitrator in this case, and his decision is final. Although the plaintiffs might in point of justice be entitled to their costs, yet as they, by the terms of the cognovit, agreed to leave the matter in the discretion of the prothonotary, it would be too much for us to say that his decision was wrong.

---

3. *What are taxable Items, and of the Charges to be allowed, and by what Court considered.*

WILKINSON *v.* MALIN, M. T. 1832. Ex. 1 *C. & M.* 237; S. C. 1 *D. P. C.* 630.

The granting of a good jury upon a writ of inquiry, being in the discretion of the Court, the costs thereof are taxable.

A MOTION was made to review the taxation; and amongst other objections, it was contended that the Master ought not to have allowed the costs of the good jury, and Dax on Costs was cited. The Court referred to the Master, who certified that, since the late Rule, H. T., 2 Will. 4, c. 101, the practice had been to allow those costs.

Per Cur.—The costs are taxable. The rule must be discharged.

JAMES *v.* DEWES, H. T. 1836. Ex. 4 *D. P. C.* 761; S. C. 1 *T. & G.* 240.

An attorney, party to a suit, on taxation, is entitled to the same costs as other suitors.

A COUNTRY attorney, a defendant in a cause, not being an attorney of this Court, defended in the name of a London agent, who was an attorney of this Court; and the defendant attended the assizes in person, and the plaintiff was nonsuited.

The Court held that the defendant was entitled to his fees for attending the trial, drawing briefs, &c., as all the business must be considered to have been done in the name of the London agent.

MADISON *v.* BEWEN, H. T. 1839. C. P. 5 *Bing. N. S.* 246.

Although the defendant calls

ON motion for a review of taxation, the fact of the defendant calling no witnesses in an action on an I. O. U. for 1000*l.*—

* By Rule, H. T., 2 Will. 4, there shall be no rule for the sheriff to return a good jury upon a writ of inquiry; but an order shall be made by a judge upon summons for that purpose.

Costs on private bills in the House of Lords are taxable by the 7 & 8 Geo. 4, c. 64.

The Court held, was not a sufficient ground for the Master's disallowance of two counsel, and the presence of the country attorney, the consideration being questioned, and much depended on the cross-examination of the plaintiff's witnesses.

no witnesses, he may be entitled to be allowed fees for two counsel, &c.

DOE *v.* DAVIS, T. T. 1840. Q. B. 4 *P. & D.* 141.

A JUDGE had certified that the execution of documents had been proved, so as to render a party in a cause, who had refused to admit such execution, liable to pay the costs of proving it.

The Court, however, refused to direct the Master to tax the costs, whilst a motion to set aside the verdict, &c., remained undisposed of.

A certificate for costs, in not admitting, cannot be taxed before the costs in the cause.

TODD *v.* FELLINGHAM, E. T. 1840. Ex. 8 *D. P. C.* 372.

ON motion to review taxation, it appeared that notice of taxing had been given one day previous to the taxation; that the affidavit to increase was not sworn till the day of taxation; but that a copy of it, omitting the jurat, had, with the notice of taxation, been delivered on the day previous to the taxation. The 10th Rule of Reg. Gen. in the Exchequer, Michaelmas Term, 1 Will. 4, is as follows: —"That one day's previous notice of the time of taxing costs upon rules, orders, town posteas, and inquisitions, and a copy of the bill of costs and affidavit to increase (if any), shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed to the attorney of the other party or parties in the same actions, at the time of service of such notice." The question was, whether the paper delivered to the opposite party could be considered a copy of an affidavit to increase, no affidavit having at that time been sworn.

Per Cur.—The rule must be construed in the same manner as an act of Parliament. It is difficult to consider the paper in question as a copy of an affidavit, when no affidavit had at that time been sworn, and there is no jurat annexed to the alleged copy. If the jurat had been copied, it is just possible to conceive that the party administering the oath might turn out to have been incompetent for that purpose; as, for instance, by being plaintiff's attorney. Perhaps the copy might have been unobjectionable, if it had been stated to be a copy of the intended affidavit to increase. The rule for reviewing the taxation must be made absolute, but without costs.

The affidavit to increase must be sworn one day before taxation*.

DOE *d.* HARVEY *v.* FRANCIS, H. T. 1839. Ex. 7 *D. P. C.* 193; S. C. 4 *M. & W.* 331.

THIS was a rule calling on the Master to review his taxation. The cause had been removed upon a bill of exceptions into a court of error, where the judgment below given after verdict was affirmed. On taxation, the Master refused to allow to the defendant in error, under 13 Car. 2, stat. 2, c. 2, s. 10, the double costs of settling the bill of exceptions and of executing a writ of inquiry of mesne da-

The court of error must order the taxation of the costs of a bill of exceptions.

* A voluntary over-payment cannot be included in the costs of taxation. (*Ward* v. *Gregg*, T. T. 1837, B. C., 5 D. P. C. 729).

mages, and the preliminary question was, whether the present application should be made to this Court or to the Court of error. 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, and 7 Will. 4 & 1 Vict. c. 30, and *Gardner* v. *Baillie*, 1 Bos. & Pul. 33; S. C. 6 Term Rep. 591, was cited.

Per Cur.—This is a matter with which we have nothing to do. Taxation of costs is a part of the judgment, and the judgment of the Court of error would be for such costs as it deemed proper. Our simple duty, under the statute, is to carry that judgment into execution. The application, therefore, should be made to the Court of error.—Rule refused.

---

4. *As to whether the Taxation is to be according to the higher or lower Scale.*

SAVAGE *v.* LIPSCOMBE, H. T. 1836. K. B. 5 *D. P. C.* 385.

If the plaintiff's claim be reduced by a cross-demand below 20*l.*, the reduced scale of taxation is right*.

THE writ was issued for a sum above 20*l.*, and before execution the plaintiff gave the defendant credit for a cross-demand, which had not been pleaded, and thereby reduced the sum to a debt under 20*l.* The Master taxed the costs upon the higher scale. On motion to review—

By the Court (*Patteson*, J., dissent).—The Master must review his taxation. The plaintiff's attorney should not have headed his bill as a debt above 20*l.* after he had given the defendant credit for the cross-demand, and thereby reduced the real debt to a less sum.

COOK *v.* HUNT, E. T. 1839. Ex. 7 *D. P. C.* 397.

As, if proceedings be staid on payment of 11*l.*, the costs must be taxed on the lower scale.

A RULE for the Master to review his taxation, costs having been allowed by him upon the higher scale under the directions of Hilary Term, 4 Will. 4. It appeared from the writ and declaration, that the action was for unliquidated damages, and an application made to try before the sheriff was successfully resisted on that ground. Subsequently, a summons was taken out, and an order made to stay proceedings upon payment of 11*l.* 5*s.*, and costs to be taxed by the Master. The officer thinking that a Judge would have certified for the higher scale, if the cause had gone to trial, allowed costs according to that scale.

Per Cur.—According to the terms in the summons, and within the meaning of the rule, the costs were improperly allowed. If the party desired costs upon the higher scale, the summons should have been worded accordingly.

* By Rule, H. T., 4 Will. 4, "In all actions of assumpsit, debt, or covenant, commenced on or after the 15th March, 1834, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* (without costs), the plaintiff's costs shall be taxed according to the reduced scale as stated in the Rule. Provided, that, in case of trial before a Judge in one of the superior courts, or judge of assize, if the judge shall certify on the postea, that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale."

HALLEN *v.* SMITH, E. T. 1839. Ex. 7 *D. P. C.* 394; S. C. 5 *M. & W.* 159.—S. P. WALLEN *v.* SMITH, E. T. 1838. Ex. 6 *D. P. C.* 103; S. C. 3 *M. & W.* 138.

THE cause had been referred to arbitration, and the sum awarded being under 20*l.*, the costs were taxed on the lower scale. On a rule nisi for the Master to review his taxation, and tax the costs between attorney and client upon the higher scale—

So, where a cause is referred, and the award under 20*l.*, the costs are to be taxed on the reduced scale.

Per Cur.—In case of a reference the attorney should see that the arbitrator has power to certify for the higher scale of costs, otherwise the attorney conducts the cause at the risk of obtaining the smaller scale of costs only. As this is the first instance of the kind, we think the Master may use a liberal discretion.

COOKE *v.* HUNT, E. T. 1839. Ex. 5 *M. & W.* 161.

A RULE for the Master to review his taxation, costs having been allowed by him upon the higher scale, under the directions of Hilary Term, 4 Will. 4; it appeared from the writ and declaration, that the action was for unliquidated damages, and an application made to try before the sheriff was successfully resisted on that ground. Subsequently, a summons was taken out, and an order made to stay proceedings, upon payment of 11*l.* 5*s.*, and costs to be taxed by the Master. The officer thinking that a Judge could have certified for the higher scale, if the cause had gone to trial, allowed costs according to that scale.

And on staying proceedings, if the costs are not to be taxed on the reduced scale, the summons should state it.

Per Cur.—According to the terms in the summons, and within the meaning of the rule, the costs were improperly allowed. If the party desired costs upon the higher scale, the summons should have been worded accordingly.

PARKER *v.* SERLE, T. T. 1838. Ex. 6 *D. P. C.* 334.

IN an action on an attorney's bill, to which there was a set-off, the cause being partially heard was referred to the Master, who was to enter into the whole account. The Master found a balance in favour of the plaintiff of 2*l.* 12*s.* Upon this, the Master refused to tax the costs upon the higher scale, and a summons for that purpose was taken out before Lord *Denman*, who thought he had no power to interfere. And on motion—

If, upon reference, an attorney's bill be reduced to a small balance, the Master may tax upon the lower scale.

The Court refused to interfere.

---

5. As to the Delivery of the Bill before Taxation.

WILSON *v.* PARKINS, H. T. 1827. Ex. 5 *D. P. C.* 461.

THE taxation of costs was objected to because the plaintiff had not complied with the rule of this Court, M. T. 1 Will. 4, r. 10, which requires that a copy of the bill of costs, and affidavit of increase shall be given to the opposite attorney one day previous to the time of taxing costs.

The bill of costs must be delivered one day before taxation.

Per Parke, B.—The rule is imperative; and it is irregular to proceed with the taxation.

6. *Of the Allocatur*.*

7. *Reviewing of†.*

GRINDALL *v.* GODMAN, H. T. 1836. B. C. 5 *D. P. C.* 378.

The number of counsel in general allowed is to be in discretion of the Master.

Patteson, J.—I am always unwilling to interfere with the Master's taxation as to matters peculiarly within his discretion, especially where it has been applied to questions of amount. But the Court will interfere with the discretion of the Master as to the number of counsel he allows on taxation, under special circumstances.

PRIMROSE *v.* BRADLEY, E. T. 1834. Ex. 2 *D. P. C.* 662; S. C. 4 *Tyrw.* 995.

or, if the Master allows a higher fee than is sanctioned by the 23 Hen. 6, c. 9;

THE plaintiff sent a letter containing a writ, with instructions to execute the same, to the deputy constable, or bodar, of Dover Castle, who was also an attorney, and afterwards had the bill of the latter taxed.

The Court refused to review the taxation of the Master, allowing charges for fees beyond thosea llowed by stat. 23 Hen. 6, c. 9, viz. 4*d.* for the warrant, and 6*s.* 8*d.* for instructing the officer to execute it.

PLATT *v.* GREENE, M. T. 1833. Ex. 2 *D. P. C.* 216.

or the expenses allowed to a witness during his attendance at the assizes, will not be reviewed.

ON motion to review the Master's taxation, it appeared that the commission day was Monday, and business began on Tuesday. This cause stood seventy in the list, and was not tried till Saturday evening, when the plaintiff got a verdict. The objection was to the allowance which had been made to the witnesses for their time: one was an attorney, and a material witness; he had been allowed eight days; others had been allowed nine days; some not so much.

The Court refused to interfere under the circumstances.

MORGAN *v.* MILLER, M. T. 1840. B. C. 9 *D. P. C.* 61.

So, where a plaintiff, under an order, may proceed to trial on payment of costs, and the Master refused the costs of a special jury, the Court refused to interfere.

AFTER a reference, by order of Nisi Prius, a rule was drawn up, signed by counsel, that the plaintiff might be at liberty to proceed to trial of the cause, on payment of the costs of the day, of a certain sum out of Court, and of the costs of and occasioned by the applications to the Court; and the Master had refused the costs of a special jury, and of a motion to postpone the trial, and of the consultations previous to those motions, and of a short-hand writer's notes of the discussion in the Court of Chancery, as to which the parties were required to report.

The Court refused to interfere with the Master's decision.

* The allocatur must be delivered to the party in whose favour the costs are taxed. (*Doe* d. *King* v. *Robinson*, E. T. 1834, B. C., 2 D. P. C. 503).

† If either party be dissatisfied with the allowance of costs, he may apply for a rule to shew cause why the taxation should not be reviewed. (*Hibbert* v. *Fox*, T. T. 1814, C. P., 5 Taunt. 660).

CLEAVER *v.* HARGRAVE, T. T. 1834. Ex. 2 *D. P. C.* 689.

A MOTION to review was opposed, because the affidavit in support of the motion did not shew that the Master had made his allocatur. It was expressly denied in the affidavit that any allocatur had been made. It was contended that a taxation could not be reviewed till the Master had made his allocatur—

And of this opinion were the Court.

No motion to review can be made before the Master has made his allocatur.

CLIFFE *v.* PROSSER, E. T. 1833. Ex. 2 *D. P. C.* 21.

ON motion to review the taxation of costs. This case was partly heard on a former day; but on that occasion it was objected as to certain affidavits being read. They had been read before the Master, but were not referred to in the rule, though notice had been given that they would be used on shewing cause; but—

Bayley, B., said, that he thought the notice was not sufficient, and that the rule nisi should have referred to them. The rule was allowed to be enlarged, on payment of the costs of the day.

Affidavits used on taxation cannot be used on motion to review, unless so stated in the rule*.

JONES, *In re*, T. T. 1832. K. B. 1 *D. P. C.* 424.

CERTAIN bills of costs of R. H. Jones, an attorney, upon Mr. R. K. Kenrick, contained charges in suits in several Courts at Westminster; among them, in the Courts of King's Bench and Common Pleas. The bills, by a rule of Court of the Common Pleas, entitled in the action by *Jones* against *Kenrick*, were referred to the prothonotary to be taxed. When the prothonotary came to that part of the business which had been transacted in this Court, he, pursuant to the arrangement which has long been acted upon, sent the bill to the Master of this Court, for him to tax that portion of it; but the Master on those occasions has no direct reference made to him by any rule or order.

The Court held, that where an attorney's bill for business in the various courts is referred to the proper officer of one of them for taxation, that officer is the person who is in practice considered as dealing with and disposing of the whole of the bill, although, by arrangement with the officers of the different courts, the part for business done in each court is examined and taxed by the officer of that particular court; and refused to make any rule upon the matter, considering it as entirely before the officer of the Common Pleas.

Where a bill is referred by C. P., and the C. P. officer refers K. B. items to officer of K. B., still the Court of K. B. cannot interfere.

PARSONS *v.* PITCHER, E. T. 1838. C. P. 6 *D. P. C.* 600.

IN this case it was contended, that the rule was in terms a rule to review the taxation of costs, and it was the universal practice, that the party applying against such a decision to allow no costs.

Tindal, C. J.—The general rule, I always thought, was, that if a case was referred back to the Master, no costs were allowed.

On a rule to review taxation, no costs are allowed.

* On motion to review, the affidavit must state the items objected to. (*Daniel v. Bishop*, 1824, Ex., 1 M'Clel. 61; S. C. 13 Price, 129).

(*e*) As to the set-off of.

MASTERMAN *v.* MALIN, E. T. 1831. C. P. 7 *Bing.* 435.

Costs to be the subject of set-off, must have been taxed,

IN this case the plaintiff had been nonsuited, and the defendant's costs had been taxed. On motion on behalf of the plaintiff, for leave to set off these costs against the costs which would be taxed for the plaintiff against the defendant in another case, (*Doe* d. *Masterman* v. *Malin*), wherein the plaintiff had a verdict, but on which a rule to shew cause for a new trial was pending before the Court—

The Court said, the costs must be taxed before they could be set off.

ASPINALL *v.* STAMP, T. T. 1824. K. B. 3 *B. & C.* 108; S. C. 4 *D. & R.* 716.

and must not be subject to a condition precedent.

A DEFENDANT was, by a Judge's order, allowed to go to trial upon certain terms, upon payment to the plaintiff of a certain sum of money, and the costs incurred up to the date of the order, and the plaintiff consented to the trial proceeding on these terms, before the costs had been paid.

Per Cur.—These costs were payable on a special order, and the payment was certainly a condition precedent, which ought to have been performed before the defendants could have the benefit of the order.—Rule refused.

HOLLIDAY *v.* LAWES, E. T. 1837. C. P. 5 *D. P. C.* 636; S. C. 3 *Bing. N. S.* 776.

Interlocutory costs may be set off against final, without reference to the attorney's lien*.

IN this case the defendant having been arrested, and having given a bail-bond, had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt. This rule was discharged with costs, (3 Bing. N. S. 541), and subsequently the defendant, who had become bankrupt, obtained judgment as in case of a nonsuit to be signed, and his costs thereon were taxed by the prothonotary. On a rule to review the taxation, on the ground that the costs might be set off, Rule, H. T. 2 Will. 4, was relied on.

Per Cur.—This case comes precisely within the rule referred to, and the plaintiff should, therefore, be allowed to set off these costs against those of the judgment as in case of a nonsuit.

DOE *d.* DANGERFIELD *v.* ALLSOP, T. T. 1829. K. B. 9 *B. & C.* 760.

So, costs of the day are the subject of a set-off against the costs of a new trial.

ON a rule to shew cause why certain costs should not be set off, it appeared that a plaintiff, after giving notice of trial, withdrew his record, and the defendant obtained a rule for payment of the costs of the day, which were taxed. At the next assizes, the plaintiff ob-

* Where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to recover interlocutory costs in that action which have not been set off on taxation. (*Beard* v. *M'Carthy*, M. T. 1840, B. C., 9 D. P. C. 136). By Rule, H. T. 2 Will. 4, it is directed, that no set-off of damages or costs shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit, against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

tained a verdict, and a new trial was afterwards granted, on payment of costs.

The Court held, that the defendant might set off the costs due to him against those payable on the rule for a new trial.

DOE *v.* CARTER, E. T. 1832. C. P. 8 *Bing.* 330.

THE trial of this cause had been put off at the request of the defendant, and upon his undertaking to pay the costs of the day; the cause afterwards went to trial, and a verdict given for the defendant, who had since obtained a rule nisi to set off the interlocutory costs so due to the lessor of the plaintiff, against the costs on that verdict.

And costs of a rule may be set off against the costs of the cause.

Per Cur.—The order for the payment of the interlocutory costs in this case was not, strictly speaking, a condition precedent; but it was a bargain, of which the defendant has had the advantage; and had the plaintiff's attorney proceeded strictly, he might have obtained the costs by attachment; the omission to do so being in effect an indulgence to the defendant. We think, that upon the plaintiff's attorney satisfying the prothonotary that any thing is due to him from the plaintiff in respect of this cause, his lien should be allowed; and that, subject to such lien, the set-off should be allowed.

NEWTON *v.* HARLAND, E. T. 1838. C. P. 6 *D. P. C.* 644.—S. P. EADES *v.* EVERALL, E. T. 1835, B. C., 3 *D. P. C.* 687.

IN an action for an illegal seizure and sale of the plaintiff's goods, under a warrant of distress, the declaration contained nine counts, two of which went to the whole value of the property, while the remaining went to the injury to the goods, and the proper dealing with them. A verdict being entered for the plaintiff on the first two counts, and for the defendant on the rest—

So, where some issues are found for the plaintiff, others found for the defendant—the costs may be set off against each other.

Per Cur.—The provisions of Rule, H. T. 2 Will. 4, are, that "no costs shall be allowed on taxation to a plaintiff, on any counts or issues, upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." We think that the defendant might set off the costs of those counts against the costs of the issues found for the plaintiffs.

PITMAN *v.* HUMPHREY, E. T. 1832. Ex. 2 *Tyrw.* 500.

ON a debt of 18*l.*, after pleading the defendant gave a cognovit in the common form, stipulating, that in case of default of payment of debt and costs, to be taxed by the Master, by the defendant on a day named, the plaintiff should be at liberty to enter up judgment. The plaintiff having entered up judgment and issued execution, on a rule to set aside the judgment and subsequent proceedings and to take the cognovit off the file to be delivered up to be cancelled, on the ground that the cognovit contained matter of agreement of the value of 20*l.* or upwards, *Reardon* v. *Swalz*, (2 East, 188), and *Ames* v. *Hill*, (2 Bos. & Pul. 150), were relied on.

So, the costs of an execution, issued upon a cognovit wrongly stamped, may be set off against the costs incurred upon it when rightly stamped;

The Court granted the rule, but suggested that the plaintiff might apply to have the instrument stamped. The plaintiff afterwards had the cognovit stamped, and entered up a new judgment, and issued execution thereon; and, as the payment of the interlocutory costs to the defendant had not been made a condition precedent

to the plaintiff's further proceedings, a rule to set off the costs given by the former rule against the costs of the cause, or to deduct them therefrom, subject to the lien of the defendant's attorney, was made.

WEBBER *v.* NICHOLAS, M. T. 1826. C. P. 4 *Bing.* 16.

and costs in equity may be set off against costs at law;

RULE calling on the plaintiff to shew cause why it should not be referred to one of the prothonotaries to ascertain the amount of the defendant's costs, recovered against the plaintiff in a suit in Chancery, instituted by him against the defendant, and why the defendant should not be allowed to set off the amount of such costs against the damages found by the jury on the trial of this cause at Westminster.

By the Court.—It is quite clear that it has been the uniform practice of this Court, from the case of *Hall* v. *Ody* to the present day, that the costs of two actions between two parties, although in different courts, may be set off against each other, notwithstanding the lien of the attorney for his costs; and although Lord *Eldon* lamented that practice in the above case, he still acted on it, and said that it would only remain for the Court to consider whether the practice should not be reconsidered. But, as that has not been done, we must still adhere to the rule there laid down. The question then is, whether the costs of a bill in equity can be set off against a verdict at law. No ground of distinction has been pointed out to us why they should not, and the case of *Harrison* v. *Bainbridge* is decisive to show that they may.

WENHAM *v.* FOWLE, H. T. 1834. B. C. 2 *D. P. C.* 444.

unless an attachment has issued;

ON motion to set off costs incurred in the Court of Chancery, for which an attachment had issued, against costs incurred in this Court. It being stated that the object was to get rid of the attachment—

Parke, J., refused the rule.

DICAS *v.* WARNE, T. T. 1835. C. P. 1 *Scott*, 584.

and the same in the Exch., for which an attachment has issued in the C. P.;

THE Court refused to allow the costs of a case in the Exchequer, in which the plaintiff had been nonsuited, to be set off against costs imposed by way of penalty on the attorney for the defendant in this cause, for which costs an attachment had issued in this Court.

WOODROFFE *v.* WOOTTON, T. T. 1837. C. P. 4 *Scott*, 364.

but costs incurred in the Bankruptcy Court cannot be set off against costs in the C. P.

THE plaintiff having presented two petitions respecting the defendants in the Court of Bankruptcy, which had been dismissed with costs, the plaintiff had obtained a rule calling upon the defendants to show cause why a portion of a debt of 780*l.* due from the defendants to the plaintiff, and secured by a judgment of this Court, should not be set off against the costs of the unsuccessful petitions in the Court of Bankruptcy—

Per Cur.—The application should not be made here. How can we stay the proceedings of another Court?

FIELD *v.* BESANT, T. T. 1833. K. B. 2 *N. & M.* 207; S. C. 5 *B. & Ad.* 357.

With respect to set off of costs, the costs of taxation need not be deducted.

AN attorney's bill set up by him as a defence by way of set-off, was, after action brought against him, referred to be taxed. The amount exceeded the plaintiff's demand; but, more than a sixth being taken off, the attorney was ordered to pay the costs of the taxation; these costs, when deducted from his bill, left a balance in favour of the plaintiff.

The Court were of opinion, that the sum found to be due upon the taxation, must, under the circumstances, be taken as the sum for which the defendant had a right to plead his set-off; and that the costs of the taxation could not be deducted. The remedy for them must be obtained by attachment. The amount was not due to the plaintiff at the time of the commencement of the action.

(*f*) AS TO THE REMEDIES FOR.

1. *By Execution**.

2. *By Action*†.

---

3. *By Attachment.*

1.—*When it lies.*

DOE *v.* FRY, M. T. 1833. Ex. 2 *C. & M.* 234; S. C. 2 *D. P. C.* 265.—S. P. LLOYD *v.* ROE, E. T. 1832. Ex. 4 *Tyrw.* 85.—S. P. DOE *v.* BARKER, M. T. 1833. Ex. 2 *D. P. C.* 217.

A defendant in ejectment is now entitled to an attachment for costs without a subpœna solvas.

ON motion for an attachment for non-payment of the defendant's costs, on an affidavit of service of a copy of the consent-rule, and the Master's allocatur thereon, on the lessor of the plaintiff, and a demand and refusal to pay the costs. The old practice as to enforcing payment of the costs of a defendant in ejectment, as stated in Dax, 94; Tidd, 1243, 9th ed., was referred to. But it was submitted to the Court whether it was now necessary to proceed by subpœna solvas.

The Court considered it unnecessary now to proceed in that manner, and granted the attachment.

* Where judgment has been obtained for costs between party and party, they may be recovered by execution. (See Hull. on Costs, 652; Tidd, 1005, 7th ed.). So, in ejectment, where there is a verdict and judgment against the tenant, execution may be taken out for the costs. (See Run. Eject. 410; post, tit. *Ejectment*).

† It has been said, that costs, as against an adverse party, are not a ground of action. (*Fry* v. *Malcolm*, M. T. 1812, C. P., 4 Taunt. 705; S. P. *Hathaway* v. *Barrow*, M. T. 1807, C. P. N. P., 1 Campb. 151). And it is clear, that taxed costs upon an interlocutory order made in an inferior court cannot be recovered by an action at law. (*Emerson* v. *Lashley*, M. T. 1790, C. P., 2 H. Bl. 248). But it is equally clear, that, as between party and party, where a judgment has been obtained, they may be recovered by action; (see Hull. on Costs, 652; Tidd, Prac. 1005, 7th ed.; post, tit. *Judgments*); and of course, as between attorney and client, the former may sustain an action for his bill. (See ante, tit. *Attorney*).

HARRISON *v.* WARD, E. T. 1835. B. C. 3 *D. P. C.* 541.

No attachment unless the order for taxing contains an undertaking to pay.

ON motion for an attachment for non-payment of costs—

Per Williams, J.—I think that, as no undertaking to pay what shall be found due on taxation is contained in the Judge's order, I cannot consider the party liable to an attachment for not paying the amount at which the costs have been taxed.

PINE *v.* PHILCOX, H. T. 1839. B. C. 7 *D. P. C.* 559.

Where things are to be done "upon payment, &c.:"—Held not to amount to a direction to pay*.

ON motion for an attachment for non-payment of costs—

Per Patteson, J.—The real question here is, whether I am to construe words of condition as words of undertaking, it being the order of a Judge that certain things should be done. I am aware, that it is an order made by consent, but the language is, "I do order" that certain things should be done, and that, upon payment or refunding, as the case may be, he (the attorney) deliver up all deeds, &c.; therefore, it is not an undertaking, but an order.

ROSE *v.* FENN, T. T. 1833. B. C. 2 *D. P. C.* 182.

No attachment lies for non-payment of costs on withdrawing a plea.

A RULE nisi for an attachment for non-payment of costs pursuant to a Judge's order. The order had been obtained by the defendant for striking out a plea on payment of costs to the plaintiff. The plea was struck out, but the costs not paid.

Per Taunton, J.—An attachment cannot issue for a mere breach of promise, but only for a contempt. I do not think, that this is a case in which the non-payment of costs can be considered as a contempt.

REGINA *v.* JAMESON, T. T. 1840. Ex. 8 *D. P. C.* 790; S. C. 6 *M. & W.* 603.

An attachment for costs can only include the costs on the allocatur, and not subsequent costs.

ON a rule calling upon the plaintiff to shew cause why an attachment issued for non-payment of costs, pursuant to a Judge's order, should not be set aside—

The Court held, that the attachment could only issue for the costs on the allocatur, and not subsequent costs; and said, in order to obtain the costs of making a Judge's order a rule of Court, the proper course was to move for a rule to shew cause why the party should not pay the costs of making the order a rule of Court, and to incorporate it with the rule for making the order a rule of Court.

2.—*Against whom it lies*†.

* Where costs are to be paid to the sheriff, who goes out of office, a power of attorney, executed by the under-sheriff, is sufficient to sustain an attachment. (*Regina* v. *Mattey*, E. T. 1838, B. C., 6 D. P. C. 515).

† The Court will only grant an attachment against the husband, and not the wife also; (*Doe* v. *Canfield*, E. T. 1838, B. C., 6 D. P. C. 523); and where costs are to be paid, pursuant to rule and allocatur, the attachment must be against the client, not the attorney. (*Poole* v. *Watkins*, T. T. 1835, B. C., 4 D. P. C. 11).

3.—*General Requisites to obtain.*

FRAME *v.* WRIGHT, H. T. 1835. B. C. 2 *D. P. C.* 325.

ON motion for an attachment for non-payment of costs, pursuant to the Master's allocatur— The party must be identified with the allocatur;

Per Patteson, J.—It must appear by the affidavit that the persons denying the payment are those mentioned in the allocatur.

STUNNEL *v.* FOWER, T. T. 1834. Ex. 2 *D. P. C.* 673.

ON a rule to shew cause why an attachment should not issue for the non-payment of costs, pursuant to the Master's allocatur, and why the service of the allocatur on the defendant's attorney should not be deemed good service— and the allocatur must be personally served;

Per Cur.—An attachment for non-payment of costs can only be granted on an affidavit of personal service.

BASS *v.* MAITLAND, M. T. 1824. C. P. 7 *Moore*, 44. HARTLEY *v.* BARLOW, 1 *Chit. Rep.* 229, *semble contra.*

IN this case the Court were of opinion that an attachment for contempt, in not paying money pursuant to the prothonotary's allocatur, on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit, stating that he shewed the original rule and allocatur to the party charged, at the time of the demand; and that it was not necessary to shew him the power of attorney. but a power of attorney, shewing the parties' authority, need not be produced;

REX *v.* PACKWOOD, T. T. 1834. B. C. 2 *D. P. C.* 571.

ON motion for an attachment for non-payment of costs, *Bass* v. *Maitland*, (7 Moore, 44), supra, was relied on; but— though, in another case, it was held that a copy of the power of attorney should be left to ground the attachment.

Patteson, J., said, There seems to be some confusion in the report; and I am not satisfied that the objection was brought before the consideration of the Court. Upon the whole, therefore, it is better to hold that the power of attorney should be produced.

4.—*Of the Demand.*

COX *v.* SALMAN, M. T. 1836. Ex. 2 *M. & W.* 127.

ON motion for an attachment for non-payment of costs, pursuant to the Master's allocatur, the only point was, whether there had been a proper demand of the costs. The attorney in the cause had demanded them, but the Master had not directed that they should be paid to him. The officer entertained some doubt whether this was sufficient; but— The demand may be made by the attorney in the cause, to whom the costs are payable.

Per Cur.—It is quite enough. Rule granted.

MASON *v.* WHITEHOUSE, E. T. 1838. C. P. 6 *D. P. C.* 602; S. C. 6 *Scott*, 246; S. C. 4 *Bing. N. S.* 692.

ON motion for an attachment— The attorney need not be authorized by

Tindal, C. J.—The question is not whether the attorney may demand them or not, but whether the plaintiff is to be treated as

power of attorney to make the demand;

being in contempt, because he has not obeyed the command of the Court. The practice is, that the demand of costs shall be made by the person to whom they are made payable by the terms of the rule, or by some person deputed by him by letter of attorney. Here, however, there is no power of attorney, but the demand is sufficient, being made by the attorney in the cause.

DENNETT *v.* PASS, E. T. 1835. C. P. 1 *Bing. N. S.* 638.

and where costs are to be paid to the attorney, a demand by the agent is sufficient;

THE plaintiff having been ordered by a rule of Court to pay the costs to the defendants or their attorney, in a cause where W. acted, with the knowledge of all parties, as the defendants' attorney in the country, and the name of T., agent of W., appeared as attorney upon the record—

The Court held, upon a rule requiring the plaintiff to pay costs, that a refusal to pay them to W., the attorney in the country, was a sufficient ground for the granting of an attachment.

INMAN *v.* HILL, T. T. 1838. Ex. 6 *D. P. C.* 666; S. C. 4 *M. & W.* 7.

and although costs are to be paid to the plaintiff, a demand by his attorney is sufficient.

THE costs had been incurred by the postponement of a trial at the assizes, in consequence of the absence of a material witness; and the Master had directed that they should be paid "to the plaintiff." On motion for an attachment, it appeared that the demand had been made by the plaintiff's attorney.

Per Lord *Abinger*, C. B.—I think the demand was sufficient, because these are costs which the attorney is authorized to receive.

SPIVY *v.* WEBSTER, H. T. 1833. Ex. 1 *D. P. C.* 696.

If, after demand, the amount be reduced, a fresh demand is requisite.

ON motion for an attachment—

The Court said that, though a party is at one time in contempt, for not paying costs which have been duly demanded, yet if, before an attachment is moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment.

5.—*Of the Rule.*

DANES *v.* SHERLOCK, E. T. 1839. B. C. 7 *D. P. C.* 592.

On an attachment for non-payment of costs, the rule must be shewn;

ON moving for an attachment, absolute in the first instance, for non-payment of costs, pursuant to a rule of Court, it appeared that, by accident, it had not been stated that the original rule was shown at the time of service—

Williams, J., allowed the attachment to lie in the office until the defect could be supplied.

DALTON *v.* TUCKER, E. T. 1837. B. C. 5 *D. P. C.* 550.

and a copy of the rule must be left,

THE difficulty in the case was, that although the case was regular in other respects, the person effecting the service had omitted to leave a copy of the rule with the defendant.

Per Williams, J.—A copy of the rule and allocatur must be left with the defendant.

ALBIN *v.* TOOMER, E. T. 1835. B. C. 3 *D. P. C.* 563.

though the party be an attorney;

ON motion for an attachment against an attorney for non-payment of costs, pursuant to the Master's allocatur, personal service of the rule had not been effected, and the reason assigned was, that it was not necessary, as the defendant was an attorney.

Sed per Williams, J.—The fact of the defendant being an attorney makes no difference, and the rule as to personal service must be equally pursued in such a case.

PHILLIPS *v.* HUTCHESON, E. T. 1835. B. C. 3 *D. P. C.* 583.

unless various attempts have been made to serve him;

ON a rule for an attachment against the defendant, who was an attorney, for non-payment of costs, various attempts had been made to serve him, and a demand made of the costs in the usual form at the office of his clerk. On the same day as the demand had been made, a letter was received in the handwriting of the attorney, in which he stated, that he was purposely keeping out of the way, on account of that and other matters.

Williams, J.—Take a rule nisi.

DICAS *v.* WARNE, E. T. 1834. C. P. 1 *Scott,* 537.

ON motion for an attachment for non-payment of costs—

when it must appear that it came to his hand;

The Court held, in order to ground an attachment for non-payment of costs, pursuant to a rule of Court, on the prothonotory's allocatur, there must, in all cases, be a personal service, unless it appears that the rule or allocatur has been seen in the actual possession of the party.

BOTTOMLEY *v.* BELLCHAMBER, T. T. 1835. B.C. 4 *D. P. C.* 26.

or, that the party has had notice of the rule and allocatur;

IN this case, it appeared, in support of an application for an attachment, that the person sought to be served had received notice of the contents of the rule and allocatur, and of the demand thereon; and on shewing cause against the rule, such knowledge was not denied.

The Court directed the attachment to issue.

REX *v.* DIGNAM, M. T. 1835. Ex. 4 *D. P. C.* 539.

or reason to believe it has come to his knowledge.

ON a rule nisi, for an attachment for non-payment of costs, pursuant to the Master's allocatur—

Gurney, B., said—Under certain circumstances, where there is reason to believe that the copy, rule, and allocatur, have come to the knowledge of the defendant, an attorney, a rule nisi for an attachment will be granted, although strict personal service has not been effected.

BIRKETT *v.* HOLME, H. T. 1836. B. C. 4 *D. P. C.* 556.

But these decisions seem now overruled.

ON motion to make a rule absolute, for an attachment for non-payment of costs—

Patteson, J.—I know that some time since cases were decided, in which it was held, that strictly personal service was not necessary, where it was clear that the defendant was keeping out of the way, to avoid being served. They have, however, been since considered,

and it has been determined, that the service must be strictly personal. There is no distinction between a rule for payment of costs, and a rule nisi for an attachment. I cannot grant a rule absolute.

STUNNELL *v.* TOWER, T. T. 1833. Ex. 1 *C. M. & R.* 88.

Service on the daughter will not do.

ON motion for an attachment for non-payment of costs, it appeared that the rule had been served on the defendant's daughter.

The Court refused the rule.

GREEN *v.* LIGHT, E. T. 1835. B. C. 3 *D. P. C.* 578—SPRAGG *v.* WILLIS, T. T. 1834. K. B. 2 *D. P. C.* 531.—S. P. BOOMER *v.* MELLOR, T. T. 1834. B. C. 2 *D. P. C.* 533.

Between attorney and client the rule for an attachment is nisi.

ON a rule for an attachment for non-payment of costs pursuant to the Master's allocatur, on taxation between attorney and client, the question was whether the rule was nisi or absolute in the first instance—

Williams, J.—As it is between attorney and client, it is nisi in the first instance.

REX *v.* SPRAGGS, M. T. 1833. K. B. 2 *N. & M.* 678.

So, where the Master had to decide on matters of account as well as costs,

ON a rule for an attachment for non-payment of costs pursuant to the Master's allocatur, to whom accounts had been referred upon the undertaking of the party—

Per Cur.—Where there is a matter of account to settle before the Master, we find that the practice of the other Courts agrees with the practice of this Court of granting only a rule to shew cause why an attachment should not issue.

RYAN *v.* FURNELL, H. T. 1836. B. C. 4 *D. P. C.* 582.

or upon reference to the Master as to what is due, the rule is nisi.

Per Patteson, J.—The rule for an attachment for non-payment of a sum of money found due by an attorney to his client, on a reference to the Master pursuant to a rule of Court, is nisi in the first instance.

FALL *v.* FALL, T. T. 1833. Ex. 2 *D. P. C.* 88.

Cause cannot be shewn against a rule for an attachment at chambers.

ON a rule nisi for an attachment for non-payment of costs, it was proposed that cause might be shewn at Chambers—

But *Bayley*, B., said it was very unusual to do so; and refused to make it part of the rule.

---

4. *By Habeas Corpus.*

FURNIVAL *v.* STRINGER, T. T. 1836. C. P. 5 *D. P. C.* 195; S. C. 3 *Bing. N. S.* 96; S. C. 3 *Scott*, 551.

A defendant is entitled to a habeas corpus for his costs against a plaintiff in custody.

THE plaintiff, being in execution at the suit of several persons in Horsemonger-lane Gaol, brought this action against the defendant, as sheriff of the county of Surrey, for unnecessary and unwarrantable harshness and cruelty in causing him to be confined on the felon side of the prison and otherwise coercing him: a verdict was found for the defendant, and he afterwards taxed his costs and sued out a

writ of habeas corpus ad satisfaciendum, by virtue of which the defendant was brought into Court and charged in execution.

And the Court held, 1st, that the course of proceeding was regular; and 2dly, that the rule of Michaelmas Term, 1654, did not require that the party against whom a writ of habeas corpus ad satisfaciendum is obtained, should be a defendant, or in custody at the suit of the party by whom it is obtained, or in the particular cause, it may therefore be issued by a defendant who has obtained a verdict against a plaintiff in custody at the suit of other persons.

III. RELATIVE TO CRIMINAL PROCEEDINGS*. See also tits. *Indictment—Information.*

REX *v.* HIGGINS, H. T. 1836. K. B. 5 *D. P. C.* 375; S. C. 1 *N. & P.* 50; *overruling* STACEY *v.* EVANS, 13 *Price*, 449; *and* JONES *v.* DAVIES, 1 *B. & Cr.* 143.

The K. B. will make no award as to costs incurred in an inferior Court, as, at the quarter sessions.

ON motion to give the prosecutor of an indictment for obstructing a highway his costs at sessions, which had been rendered useless by the defendant obtaining a certiorari for the removal of the indictment, no notice of the writ having been given until after defendant had given notice of trial and the expenses had been incurred.

Per Cur.—The case of *Stacey* v. *Evans* (13 Price, 449) appears to be founded on the authority of *Jones v. Davies*, (1 B. & C. 143), and that case must be taken to be overruled by *Rex* v. *Passman*, (1 A. & E. 603). As those cases, therefore, cannot now be considered as law, and as it has not been shewn that this Court has any authority to grant these costs, that part of the rule must be discharged.

Cotton Factories.

REX *v.* FELL, M. T. 1830. K. B. 1 *B. & Ad.* 380.

Upon a conviction of the foreman of a cotton-factory for working children beyond hours, the clause in the 42 Geo. 3, c. 73, taking away the right to a certiorari, is a provision incorporated by refer-

THE defendant had been convicted before two justices of having employed children in a cotton-factory during improper hours, contrary to the stat. 6 Geo. 4, c. 63, intituled "An Act to make further provisions for the regulation of Cotton Mills and Factories, and for the better Preservation of the Health of Young Persons employed therein." The hours of work for children were limited by a former statute, 42 Geo. 3, c. 73. The same statute imposed certain other regulations, with penalties for disobedience; and by the 15th section, after giving the mode of recovering forfeitures, it enacted, that no conviction under the statute should be removable by certiorari. Some new provisions were made by the act 59 Geo. 3, c. 66; it also increased the penalties, and directed that the same

* *In Cases of Felony.*]—By 7 Geo. 4, c. 64, s. 22, the Court may allow expenses of prosecutions in cases of felony whether a bill be preferred or not.

In Cases of Misdemeanor.]—By 7 Geo. 4, c. 64, s. 23, expenses in certain cases of misdemeanor may be allowed.

And section 24 of the 7 Geo. 4, directs the payment to be by the county treasurer; and s. 25 regulates as to places having no county rate.

ence in the 6 Geo. 4, c. 63.

should be levied, recovered, and applied as prescribed in the former statute. These acts are all referred to in the preamble of the 6 Geo. 4, c. 63, which declares it to be expedient that some further provision should be made for the regulation of cotton mills and factories. Some of the former enactments are there altered, and some new ones introduced. Among the latter, in the 2nd section, is a proviso, that no child shall be worked more than nine hours, or after a certain hour on Saturday; the penalties for disobedience of the regulations before imposed only on masters and mistresses, are, by sect. 8, extended to overseers and foremen; a specific clause (the 13th) excludes appeal against any conviction under this act; and then it is enacted, by sect. 15, "That all and every the powers, provisions, exemptions, penalties, forfeitures, payments, remedies, matters, and things contained in the same hereinbefore-recited acts (save and except such parts thereof as are expressly varied, altered, or otherwise provided for by this act), shall respectively be as good, valid, and effectual for carrying this act into execution as if the same had been respectively repeated and re-enacted in the body of this act." The defendant, in the present case, had been convicted as a foreman, on the 2nd section of the new act, of employing children on a Saturday beyond the time allowed for that day. On motion for a certiorari to remove the conviction—

Per Cur.—We think that the clause of 42 Geo. 3, c. 73, taking away the certiorari, must be considered as a "provision" embodied in the 6 Geo. 4, c. 63, for carrying this act into execution.—Rule refused.

Counsel's Signature.

(See also tit. *Barrister*).

REED *v.* SPURR, M. T. 1836. Ex. 5 *D. P. C.* 330; S. C. 2 *M. & W.* 76.

Plea of plene administravit need not in the Exchequer be signed*.

THE defendant pleaded plene administravit, without a counsel's signature, and the plaintiff signed judgment. On motion to set aside the judgment, it was contended, that, according to the practice of the King's Bench, this is a common plea, which need not be signed by counsel. The Rule of Hilary Term, 2 Will. 4, No. 107, which provides that pleas which conclude to the country shall not be signed by counsel, does not apply to this case.

Lord *Abinger*, C. B.—The Master tells us we follow the practice of the King's Bench, and that this plea does not require counsel's signature. The judgment is irregular, and must be set aside with costs.

* All special pleas and subsequent proceedings which conclude with a verification must, in K. B., be signed by a barrister, except the pleas of plene administravit, comperuit ad diem, nul tiel record, and son assault demesne, or liberum tenementum, and in the Common Pleas, except comperuit ad diem, solvit ad diem, and nul tiel record; but it is now a rule that "all pleadings which conclude to the country need not be signed by counsel". (H. T., 2 Will. 4).

And by R. H. T., 4 Will. 4, "To a joinder in demurrer no signature of counsel shall be necessary."

POWER *v.* FRY, M. T. 1834. C. P. 3 *D. P. C.* 140.

During the time the warrant of Will. 4, was in force, the serjeants' exclusive right of signature was abolished.

A PLEA of judgment recovered was delivered in the case without a serjeant's signature; it was, however, after King William the Fourth's warrant, dated the 24th April, 1834. The plaintiff had signed judgment. On motion to set it aside—

Per Cur.—His Majesty, by his royal warrant, dated the 24th April 1824, orders and directs, "that the right of practising, pleading, and audience in our said Court of Common Pleas during term time, shall, upon and from the 1st day of Trinity Term now next ensuing, cease to be exercised exclusively by the serjeants-at-law; and that, upon and from that day, our counsel learned in the law, and all other barristers-at-law, shall and may, according to their respective rank and seniority, have and exercise equal right of practising, pleading, and audience in the said Court of Common Pleas at Westminster with the serjeants-at-law. We think that this virtually repealed the rule which before required pleas to have the signature of a serjeant.

Ex parte SERJEANTS AT LAW, T. T. 1840. C. P. 8 *D. P. C.* 268; S. C. 6 *Bing. N. S.* 187.

But in 1840, the warrant was declared illegal, and the serjeants' exclusive right revived.

THE question of the validity of the royal warrant of the 23rd of April, 1834, whereby it was directed, that the King's counsel and all other barristers-at-law should, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the Court of Common Pleas, was brought under the consideration of the Court by Wilde, Serjt., on behalf of himself and those serjeants on whom no higher rank and place in the courts of law and equity had been conferred. He stated, that a memorial had been presented to the Crown, praying that legal advice might be taken as to the legality of the warrant, which memorial had been referred to, and the question discussed before the judicial committee of the privy council, but that the consideration thereof had been adjourned sine die, and the Crown had declined to interfere. The serjeants, therefore, in the assertion of their ancient rights, and in order to maintain their privileges, could only call upon the Court to vindicate its legal constitution and practice, by excluding all barristers not of the degree of the coif from practising and pleading in that Court.

Per Cur.—The question before us turns upon the single point whether the serjeants-at-law have, by the constitution of the Court, and consequently by law, held and enjoyed the sole and exclusive privilege, by virtue of their office or degree of serjeant, of practising, pleading, and audience in the Court of Common Pleas; for if they are so entitled, we think they cannot be deprived of it by warrant from the Crown under sign manual, nor, indeed, by any power short of that of an act of the whole legislature. That the antiquity of the state, degree, and office of serjeant-at-law is as high, at the least, as the existence of the Court itself, is evident from all the text writers and records which bear upon the point. They are mentioned in the "Mirror of Justice," a book of great authority, and of the earliest, though uncertain antiquity; by Bracton, who wrote in the time of

Henry the Third; and in records, which are to be found in the Tower, in the time of Edward the First. We therefore think ourselves justified in saying, that from time immemorial the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and the warrant of the Crown can no more deprive the serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the Court itself. The rights and privileges of the serjeant, and the rights and privileges of the peer of the realm, stand upon the same foundation—immemorial usage. We hold, therefore, that the rights of the serjeants to the sole and exclusive privileges which they claim is still in existence, notwithstanding the King's warrant; and we feel ourselves bound, in the due course of administering justice, to allow such right to be still exercised.

SALTER *v.* POMFORD, E. T. 1840. Q. B. 8 *D. P. C.* 435.

Counsel need not sign the plea delivered.

THE plaintiff signed judgment for want of a plea. The question was, whether the copy of the signature of counsel, placed on the draft, was a sufficient signature, according to the practice of the Court. The draft had been signed by the counsel himself, and copied on the plea delivered.

Per Coleridge, J.—I have spoken to the other Judges of this Court, and also to the Judges of the Court of Exchequer, and particularly to Mr. Baron *Parke*, who is stated to have entertained an opinion in favour of the course which the plaintiff has adopted. I find that is a mistake; he only recollects refusing to set aside a judgment as irregular which had been signed, on the ground of the counsel's clerk having signed the pleas. That is a very different case. It is quite obvious that the convenient course is for the barrister to sign the draft; it being impossible, in many cases, for counsel to sign the copy delivered. It seems, therefore, to the Judges, to be a convenient rule to lay down, that it is sufficient for the counsel to sign the draft.

Counterfeiting Money. See *Coin and Coinage.*

Country Bankers. See tits. *Bankers—Cheque.*

Counts, Joinder of. See tit. *Declaration.*

County Clerk*.

FARR *v.* HOLLIS, T. T. 1839. K. B. 9 *B. & C.* 315.

A bond, given by a county clerk to account, under the 12 Geo. 3, c. 29, will be construed to mean to account under other statutes also.

IN debt, on bonds given by the treasurer of the county to the clerk of the peace, under 12 Geo. 3, c. 29, conditioned for his well and truly accounting for all monies received by him in his office, when required by the justices at the quarter sessions, or the major part of them, or by any committee of the said magistrates, duly appointed for the purpose, by any order of the Court of quarter sessions; and also faithfully perform the trusts reposed in him by virtue of his office.

The Court held, that, under such condition, the county clerk was bound to account for all monies received by him under that and all subsequent acts, and that it was a sufficient breach to allege that, whilst such treasurer, he had received divers sums, and was required by the justices at sessions to account, but did not do so, without alleging that he was so required "by any order of the court of quarter sessions"—those words referring only to the appointment of any committee:—Held, also, that under the 43 Geo. 3, c. 47, ss. 9, 16, 17, (Militia Act), it was his duty, after he had reimbursed overseers the allowances to the family of a party serving in the militia of another county, to transmit to the treasurer of such county an account of such sums, and a breach of such duty was well assigned; but that he was not bound to demand or take any proceedings against him to recover such sums, nor to notify the default in non-payment by him within a reasonable time to the justices at sessions; neither was it any part of his duty, after he had himself been called upon to reimburse the treasurer of another county like allowances, to obtain an order of sessions for the overseers of the parish of the party serving to repay those sums; and that breaches, assigning such acts to be part of his duty, could not be sustained.

Breach on such a bond when well assigned.

County Court. See tit. *Courts*.

County Gaol.

REGINA *v.* JOHNSON, T. T. 1840. Q. B. 2 *P. & D.* 610.

A borough with respect to their prisoners is bound to contribute to the county gaol; the amount being calculated in proportion to the general expenses of the gaol.

THE 5 Geo. 4, c. 85, empowers the justices of the peace for boroughs to contract with those of adjoining counties for the support and maintenance in the county gaol of any prisoners committed thereto from such boroughs. The 5 & 6 Will. 4, c. 76, s. 114, enacts, "That the treasurer of every county shall send in accounts of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate

* Custody of documents, deposited with the clerk of the peace under the standing orders of the House of Commons, regulated by 1 Vict. c. 83.

court of quarter-sessions is holden, to the council of the borough, and make an order on the council for payment of the same." A contract had been made under the provisions of the former act, between the justices of the peace of the city of H. and those of the county of H., for the support and maintenance of prisoners committed to the county gaol from the city. In practice, prisoners originally committed to the city prison, when tried at the assizes, were committed on conviction to the county prison, and supported there under this contract. Subsequently to the expiration of the contract the same practice continued.

The Court held, 1st, that the council of the city was liable to the county in respect of prisoners so committed to the city prison for trial, and afterwards committed in execution of their sentences to the county prison after the expiration of the contract under the 5 & 6 Will. 4, c. 76, s. 114. And held, 2ndly, that the amount to be paid by the council for their support and maintenance was properly measured by the proportion of each of such prisoners to the general expenses of the county gaol, and not by the estimate of their food, clothing, punishment, and such other expenses as were a charge upon the gaol directly and solely occasioned by their imprisonment therein.

County Rate.

Rex *v.* Justices of Berwick, E. T. 1828. K. B. 8 *B. & C.* 327.

Berwick-upon-Tweed is within the 55 Geo. 3, c. 51, as to county rates.

This case raised a question upon the construction of the 55 Geo. 3, c. 51, s. 24, relating to county rates. The question was, whether the town of Berwick-upon-Tweed was within either of the terms or the meaning of that act. The following is the clause upon which the argument mainly turned:—"And be it further enacted, that where any ridings or divisions have separate commissions of the peace, or where any cities, towns, or other places within that part of Great Britain called England have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissions of the peace for the counties at large in which such liberties or franchises lie, and do not nor did before the passing of this act contribute or pay to the several rates made for the said counties at large, it shall and may be lawful to and for the justices of the peace of such separate jurisdictions, within the respective limits of their commissions, to have, use, and exercise all and singular the powers, authorities, and methods, given or prescribed by this act; and all such separate jurisdictions are hereby declared to be subject thereto, in the same manner to all intents and purposes as counties at large; any law, usage, or custom to the contrary notwithstanding." The justices of Berwick-upon-Tweed in sessions had made an assessment, in the nature of a county rate, upon the borough, and ordered it to be levied upon the parish, (which is coextensive with the borough), and had issued a precept, directed to the high-constable of the borough, commanding him to issue his warrant to the churchwardens and overseers of the parish, requiring payment of the money thus assessed. On motion for a certiorari—

Per Cur.—We cannot doubt that it was the intention of the Legislature by the act of the 55 Geo. 3, to include every place that had

jurisdiction of itself which did not contribute to the county rate, and was not subject to the jurisdiction of a county. Supposing this to be clearly the intention, if the words are too narrow, we may enlarge them. This borough has a separate commission; it clearly is not subject to the commission of any county, and is not subject to the rate of any county. It therefore agrees with the description of place intended by this act to be provided for; we think, then, it matters not whether it be within any county or no. And we think, (without reference to the state of the revenues of this corporation), that it may be very reasonable to raise a fund for the payment of expenses to which those revenues would not be liable when the charter was granted. No person could be compelled to contribute to the expenses of prosecutions and other expenses of that description, except by a county rate or a rate under this act in the nature of a county rate.

REX *v.* SHEPHERD, M. T. 1834. K. B. 4 *N. & M.* 135.

A borough with which county justices have never interfered are not bound by the county rate made by the county justices.

THIS was an indictment against the defendant, one of the high-constables of the borough of Marlborough, in the county of Wilts, for not obeying an order of the justices of the quarter-sessions of that county, commanding him to issue his warrant to the overseers of the several parishes in that borough, to collect and levy 9*l.* 14*s.* for the purposes of the county rate for the county of Wilts. The defendant pleaded not guilty. The question was, whether the justices of the peace for the county of Wilts have power to enforce a county rate in the borough of Marlborough. The charter gives the borough justices jurisdiction within the borough as ample as that belonging to justices of the county within the county, but it prohibits them from trying felonies. The only facts in the case applicable to this question were, that the borough justices act within the borough, and the county justices exercise no jurisdiction there; that the borough justices have since 1775 levied rates in the nature of county rates, and the county have never rated them. The borough has a gaol of its own, and the county gaol is situated in the borough. The prisoners apprehended and committed in the borough have been apprehended and committed by warrants of county justices. The expenses of conveying them before trial to Fisherton gaol have been paid by the borough; but the expenses of maintaining them in gaol, and conveying them from that gaol to the assizes, by the county.

Per Cur.—There is some confusion in the cases, which appears at first sight not easy to be reconciled; but, as our opinion is founded on the words of the proviso in 55 Geo. 3, c. 51, s. 1, and the 24th sect. of the same statute, we think it unnecessary to discuss those decisions. The proviso, after authorizing the justices of the peace for the several counties in England at their sessions to make a fair and equal county rate, goes on to say, by the 1st sect.: "provided also, that nothing in this act contained shall extend, or be construed to extend, to give any jurisdiction to the justices of the peace of the several counties over any places situated within the limits of any liberties or franchises, having a separate jurisdiction, which, before the passing of this act, were subject to rates, in the nature of county rates, imposed and assessed by the justices of the peace for such liberties and franchises, or which were exempt from the rates

of the county in which they lie." By the 24th sect., authorizing rates for counties, towns, and other places, having commissions of the peace, it is enacted, that, "Where any ridings or divisions have any separate commissions of the peace, or where any cities, towns, or other places, within that part of Great Britain called England, have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissions of the peace in which such liberties or franchises lie, and do not, nor did before the passing of the act, contribute or pay to the several rates made for the said counties at large, it shall and may be lawful for the justices of the peace of such separate jurisdictions, within the respective limits of their jurisdiction, to have, use, and exercise all and singular the powers, authorities, and methods given or prescribed by those acts; and all such separate jurisdictions are thereby declared to be subject thereto, in the same manner, to all intents and purposes, as counties at large." It is sufficient to say that this is a case within the proviso. Marlborough is a place having a separate jurisdiction; and it was before the passing of the act, subject to rates, in the nature of county rates, imposed and assessed by its own justices; both conditions therefore are satisfied. We are aware that this construction is not in accordance with some of the decisions to be found in the cases cited, or rather, with what is said by Lord *Tenterden*, in *The King* v. *Clarke*, (5 B. & Ald. 665), that the jurisdiction of borough magistrates must be coextensive with that of county magistrates; and with what *Bayley*, J., says in the beginning of his judgment in the same case; but, as this case does not admit of a decision, owing to the incongruous circumstances of which it is composed, without conflicting with some of the authorities, we think the safest mode is to abide by the words of the statute. Judgment for the defendant.

MENAR *v.* DAVIS, E. T. 1830. K. B. 10 *B. & C.* 617.

And where, by statute, county justices are not to interfere with a town, the town justices may make a rate.

THE town of Maidstone is a corporate town, and was first incorporated by a charter in the third year of the reign of King Edward the Sixth, in the year 1549, and has been so continued to the present time by five other charters, viz.; 2 Eliz. in 1559; 2 James 1, in 1604; 17 James 1, in 1620; 34 Charles 2, in 1682, and 21 Geo. 2, in 1747; which last-mentioned charter was duly accepted by the inhabitants of the said town and parish; and after reciting therein, that the town and parish was an ancient and populous town, and had enjoyed divers liberties, &c., by virtue of certain charters of former kings and queens of England, by the mayors, jurats, and commonalty of the town and parish of Maidstone, in the county of Kent, it was granted and ordained, that the said town and parish should, for ever thereafter, be and remain a free town and parish of itself, and that the inhabitants thereof should be a body corporate in deed and name, by the name of the mayor, jurats, and commonalty of the king's town and parish of Maidstone, in the county of Kent; and for the better preserving and keeping the town and parish in peace and good government, it was ordained, that the mayor and recorder of the town and the three senior jurats should be justices to preserve the peace within the town and parish, and to do and execute all and singular matters and things which belong to the office of a justice of the peace, in as ample manner as other justices of

the peace of the county of Kent had been accustomed to do and execute; and that no justice of the peace of the said county of Kent should in anywise intermeddle within the said town and parish, to do any thing which there belongeth or appertaineth to the office of a justice of the peace. At the general quarter sessions of the peace, duly holden in and for the said town and parish of Maidstone, on the 26th of October, 1825, before the mayor, recorder, and three justices of the said town and parish, the said mayor, recorder, and three justices did order a rate and assessment to be made upon all the rateable property within the said town and parish, as a town stock or rate in the nature of a county rate. In trespass for distraining for such rate, the question for the opinion of the Court was, whether the mayor, recorder, and justices of Maidstone, had or had not authority to make the order of the 26th of October, 1825, for the making of a rate or assessment, as a town stock or rate in the nature of a county rate.

Per Cur.—The case of *Wetherhead* v. *Drewry* (11 East, 168) establishes, that where a charter contains an absolute non-intromittent clause, the justices therein named have an exclusive jurisdiction, and the place has, in fact, an exclusive commission of the peace, and is liable, under 13 Geo. 2, to a rate, in the nature of a county rate, although it is not a county of itself; that case, therefore, would be an authority to shew that the borough of Maidstone standing in that respect in the same situation in which the town of Derby (mentioned in *Wetherhead* v. *Drewry*) then stood, the justices acting for that borough would be entitled to make a rate in the nature of a county rate. The purposes to which the county rate is applicable, are both numerous and various; the building and repairing of bridges; the making and maintaining of gaols, and houses of correction; besides many other purposes. Now, in this case, there is a charter, which charter contains a non-intromittent clause; and the language of that non-intromittent clause is material, because it shews that the borough justices, and the borough justices only, have jurisdiction as to matters arising within the place, and that the county justices can in no way interfere within the limits of the borough. The charter states that the town and parish should for ever thereafter remain a free town and parish of itself, and that the inhabitants thereof should be a body corporate in deed and name, by the name of the mayor, jurats, and commonalty of the king's town and parish of Maidstone, in the county of Kent; and for the better preserving and keeping the town and parish in peace and good government, it ordained that the mayor and recorder of the town, and their senior jurats, should be justices, to preserve the peace within the town and parish, and to do and execute all and singular matters and things which belong to the office of a justice of the peace, in as ample manner as other justices of the peace of the county of Kent had been accustomed to do and execute the same; "and that no justices of the peace of the said county should in any wise intermeddle within the said town and parish, to do any thing which there belongeth or appertaineth to the office of a justice of the peace." There is, therefore, no single act, in his character of a justice of the peace, which a county magistrate can do, that is not exclusively confined to the justices of the town and borough. For these reasons, there being an exclusive jurisdiction and a non-intromittent clause as to the justices of the peace generally, for all

ordinary purposes, and there being no right in the county justices in any respect to interfere within the limits of this borough, not even to issue a warrant for the purpose of levying a county rate, we are of opinion that this is a case in which the borough justices of Maidstone are entitled to make their own rate, in the nature of a county rate.

REX *v.* HAYWARD, E. T. 1837. K. B. *6 A. & E.* 590.

An immemorial prescription and lost grant does not exempt a borough from a county rate.

IN a borough by prescription, there were various charters, none of which contained any non-intromittent clause; and there were borough justices, who did not try felonies, and had no separate jurisdiction; yet the inhabitants had never been assessed to the county rate, but had always supported their own bridges and gaol, and had paid the expenses of prisoners within the gaol, and the costs of conveying them to the assizes, these expenses being defrayed by a borough rate.

The Court held, that the borough could not support an exemption from the county rate on immemorial prescription or a lost grant, on the ground of ever having maintained its own bridges, and gaol, and inquisitions before its own coroner, as the borough was not within the proviso in the 55 Geo. 3, c. 51, s. 1, and thereby exempt from the county rate.

REX *v.* JUSTICES OF BUCKS, T. T. 1827. K. B. *7 B. & C.* 3.

A local act, limiting the time of appeal, does not preclude churchwardens, &c., from availing themselves of the right of appeal under the 55 Geo. 3, c. 51;

ON a rule to shew cause why a mandamus should not issue to the defendants, commanding them to cause continuances to be entered to the next general quarter-sessions of the peace, upon the appeal of the churchwardens and overseers of the poor, and the inhabitants of the parish of Iver, against two several county rates ordered to be levied on the 9th of January and 15th of February 1827, and at such next general quarter-sessions of the peace to hear and determine the merits of the said appeal. This rule had been obtained upon an affidavit, stating in substance that the rates in question had been fixed and assessed upon the parish of Iver, as the due proportion of the said parish towards the county rate; that an appeal was entered at the sessions, upon the ground that the parish of Iver was, by the said rates, assessed in a much larger proportion than the parish of Langley Marsh; but that the justices refused to receive and hear the said appeal, upon the ground that a rate for the said county of Buckingham had been made out, and the proportion thereof to be from time to time paid by each parish within the said county had been fixed, pursuant to the provisions of an act of Parliament made and passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intitled "An Act for making a fair and equal County Rate for the County of Buckingham;" and that the said two rates appealed against, and the said assessments complained of, being conformable to the rate so made, and the provisions thereby fixed, they, the said justices, had no power by law to alter the same, nor to receive and hear the said appeal, either under the act of Parliament hereinbefore mentioned, or under the act of Parliament made and passed in the fifty-fifth year of the reign of his said late Majesty, intitled "An Act to amend an Act of his late Majesty King George the Second, for the more easily assessing, collecting, and levying County Rates."

Per Cur.—The rule must be absolute. The appeal was made in sufficient time to comply with the requisitions of 55 Geo. 3, c. 51. The 14th section of that act distinctly referred to all rates made, or to be made, under any act or acts then in force; and there was no reason why those words should be confined to general and public acts, and not to be held to apply equally to acts of a local nature. If they were so applicable, then the present question depended solely upon the 14th section. It was indeed objected, that the effect of that section was constrained by the 21st; but we think that the latter related only to the authority of justices, and the manner of collecting and levying the rates. There ought to be a uniform construction given to the power of appeal; and it should be the same in all counties.

REX *v.* JUSTICES OF WESTMORELAND, M. T. 1829. K. B. 10 *B. & C.* 226.

THIS case came before the Court upon motion for a mandamus to be directed to the justices, commanding them to re-enter an appeal by the officers of the township of Shap against a county rate. The following were the facts:—The churchwardens and overseers of Shap appealed against the county rate, on the ground that the rate was unequal in respect of the yearly value of property held by persons in the parish of Bampton; so that, upon the comparison, it would be found that persons in Bampton had been under-rated, and persons in Shap had been over-rated. To entitle themselves to be heard at the sessions on this appeal, the officers of Shap, in pursuance of the 57 Geo. 3, c. 94, s. 2, gave notice of the appeal, stating the above ground to the parish officers of Bampton; to the persons of that parish who were alleged to have been under-rated; to the clerk of the peace; and to the high constable. On the appeal being called on, the appellants offered evidence to prove the general inequality and disproportion of the respective rates upon Shap and Bampton; but the court refused to hear the appeal, and dismissed it, on the ground of the notice being in this respect defective.

but the right of appeal, under the 55 Geo. 3, c. 51, is confined to cases where the parish, township, or place is aggrieved, and not a particular individual.

Per Cur.—The stat. 55 Geo. 3, c. 51, s. 14, gives the right of appeal to the churchwardens or overseers of the poor of any parish aggrieved by any rate, "whether it be on account of the proportions assessed upon the respective parishes, townships, or places being unequal; or on account of some one or more of them being without sufficient cause omitted altogether from the rate; or on account of such parish, township, or place being rated at a higher proportion of the pound sterling, according to the fair annual value of the ratable property therein; or on account of some other parishes, townships, or places being rated at a lower proportion of the pound sterling, according to the fair annual value of the ratable property therein, than has been fixed and declared by the justices of the said county in sessions assembled, as the basis of the rate of the said county; or on account of any other just cause of complaint whatsoever." The appeal, therefore, is given to a parish aggrieved by reason of the sum assessed upon it being disproportioned to the sum assessed upon some other parish; but no appeal is given to the particular inhabitants of any parish against the rate made by the overseers, for raising the sum assessed by the sessions upon the parish in respect of the county rate.

REX *v.* INHABITANTS OF BLACKANTERS, E. T. 1830. K. B. 10 *B. & C.* 793.

The notice of appeal against a county rate must state, that the party is rated higher than the fair value of the property.

A NOTICE of appeal stated the ground of appeal to be, that the rate was unequal and defective, inasmuch as the appellant parish was assessed at a higher proportion of the pound sterling, according to the fair annual value, &c. than the respondent parish was charged, according to the fair annual value, &c.

The Court held the notice to be defective; as both parishes might have been valued too low, and yet the appellant parish might have no reason to complain, with reference to the basis on which the whole rate was made. A notice of appeal against a rate, by reason of inequality, ought, in the terms of the act, to state the ground of appeal to be, that the parish intending to appeal "is rated at a higher proportion of the pound sterling, according to the fair annual value of the ratable property therein, than has been fixed and declared by the sessions as the basis of the rate."

REX *v.* JUSTICES OF STAFFORD, H. T. 1837. K. B. 1 *N. & P.* 260.

Rate-payers have no right to inspect the records and documents as to county rates, deposited with the clerk of the peace.

A MANDAMUS, directed to the justices of the peace of the county of Stafford, and to the clerk of the peace of the same county, recited, that since December 31, 1831, various rates and assessments had been made by the justices upon the different parishes in the county, and money had been collected under them, and orders had been made by the said justices for the expenditure, and orders of sessions had been made thereon, and indictments or presentments had been made respecting county bridges, and orders of sessions made respecting the taking down and rebuilding of the same, and for payment of sums respecting the same, and divers bills of costs for business alleged to have been done and performed by the said clerk of the peace; and divers accounts of disbursements made by him, which were comprised in the annual accounts for the said county for the year 1833, had been by two orders of sessions allowed, and directed to be paid by the county treasurer. It further recited, that application had been made to the said justices, by divers inhabitants of the township of Marchington Woodlands, in the county, to permit the inhabitants of the said township, which was contributory to the said rates or assessments, or their attorney, to inspect and take copies of the said rates, orders, &c., together with all accounts, proceedings and documents relating thereto, together with the said bills of costs and disbursements remaining in the custody of the said justices, and commanded the said justices and clerk of the peace to permit and suffer the said rate-payers to inspect and take copies of the above. The justices returned, that they had ordered that the rate-payers, or their attorney, might inspect and take a copy of all the rates, orders for expenditure thereof, all proceedings relative thereto, and all indictments or presentments respecting county bridges, and orders relative to the taking down and rebuilding of the same; but that the bills of the clerk of the peace, and the other accounts referred to, which were the accounts and vouchers of the treasurer and high constables, had been passed by the justices at the quarter-sessions, and had been deposited with the clerk of the peace to be kept among the records of the county for the

inspection of the said justices, according to the statute, and that a true and accurate abstract of the accounts had been duly published once in every year in a public newspaper circulating in the county.

The Court held, that county rate-payers have no right, either at common law or by statute, to inspect and take copies of the bills of charges of county officers after they have been deposited by the clerk of the peace among the records of the county in pursuance of 12 Geo. 2, c. 29, s. 8. The justices of the peace for the county are alone entitled to such an inspection.

County Treasurer.

REGINA *v.* JONES, 1839. 2 *Moody, C. C.* 171.

The county treasurer is justified in refusing to pay an order partially destroyed.

THE order for the expenses of a prosecution given to the attorney had annexed the details of the allowance, which part of the order the attorney tore off, and presented only the order stating the aggregate amount—

The Court held, that the county treasurer was justified in refusing to pay it.

Courts*.

I. RELATIVE TO COURTS IN GENERAL, p. 276.

II. RELATIVE TO INFERIOR COURTS, p. 276.

III. RELATIVE TO COUNTY COURTS, p. 279.

IV. RELATIVE TO COURTS OF EQUITY, p. 282.

V. RELATIVE TO COURTS LEET, p. 282.

VI. RELATIVE TO COURTS MARTIAL, p. 282.

* By 1 & 2 Vict. c. 32, it is enacted, "That from and after the passing of this act it shall be lawful for the Courts of Queen's Bench, Common Pleas, and Exchequer, at their discretion to hold sittings in Banc, in time of vacation, at such times as are now by law appointed for holding sittings at Nisi Prius in London and Middlesex, for the purpose of disposing of business then pending and undecided in such courts respectively." "And be it further enacted, That such sittings in vacation may be holden by virtue of a rule or order of the said Courts respectively to be made in or out of term, whereof a week's notice shall be published in the London Gazette, and affixed in some conspicuous place on the outside of such Courts respectively making such order, and also in the chambers of the Judges or Barons of the same Courts respectively." "And be it further enacted, That all judgments to be pronounced, and all rules and orders to be made by virtue of this act, shall have the same effect, to all intents and purposes, as if they had been pronounced or made in term time."

I. RELATIVE TO COURTS IN GENERAL.

Doe *v.* Edwards, H. T. 1839. Q. B. 1 *P. & D.* 408.

If a statute creating a court gives a seal, other courts will take judicial notice of the seal.

In ejectment, the question turned upon whether the notice to quit ended at the proper quarter day. According to the lessor of the plaintiff, the tenancy commenced at Michaelmas; and to prove that fact, he produced a copy of a schedule filed by the defendant in the Insolvent Debtors' Court, in which he had described his first quarter's rent as due at Christmas. This copy was stamped with the seal of that court. It was objected, that there ought to have been proof of this being the seal of the court; but Lord *Denman*, C. J., held that to be unnecessary, and the plaintiff recovered a verdict.

Per Cur.—This being a court created by act of Parliament, the Court will take judicial notice of its seal. The stat. 7 Geo. 4, c. 41, s. 7, only states specifically what was the legal construction of the former act.—Rule refused.

Rex *v.* Mayor of Wells, H. T. 1836. K. B. 4 *D. P. C.* 563.

A court given by a corporate charter is not abandoned by disuser.

Rule for a mandamus to be directed to the mayor and corporation of Wells, commanding them to hold a certain court for the trial of causes of a limited amount within the precincts of the corporation. In answer to the rule, affidavits were produced, shewing that the court in question had been disused for two hundred years; that there were no funds which could be appropriated to the holding of the court; and that no one was acquainted with the practice of the court.

Per Patteson, J.—The power to hold this court being granted by the charter, I do not think that the corporation can lay it aside merely on the ground of want of funds; and as to length of time, I cannot distinguish between fifty-two years, in the case of *Rex* v. *Mayor of Hastings*, (1 D. & R. 148), and two hundred.

II. RELATIVE TO INFERIOR COURTS.

Dod *v.* Grant, E. T. 1836. K. B. 6 *N. & M.* 70.

The Uniformity Act does not extend to inferior courts; and therefore the declaration may be according to the old forms.

The declaration commenced thus:—"Middlesex to wit; Charles Dod, &c., complains of James Charles Grant, being in the custody of the marshal of the Marshalsea of our lord the now King, before the King himself," &c. Special demurrer, shewing for cause that, in the beginning of the declaration, the plaintiff had not followed the rules prescribed by the Court; for it is not stated therein that the defendant had been summoned to answer the plaintiff, or that he had been arrested, or that he is detained in custody at the suit of the plaintiff; and that the commencement is in the same form as used before the Uniformity of Process Act.

Per Cur.—According to the old practice before the Uniformity of Process Act, there can be no doubt that this would have been a perfectly regular declaration. Now, the act of Parliament only applies to actions commenced in the superior courts, and neither the act nor the new rules have any application to actions commenced in the Palace Court, or other inferior courts; but then it is said, if

this action was commenced in the Palace Court, it ought to have so appeared in the declaration, otherwise upon the face of the declaration there is no jurisdiction. There was jurisdiction before the Uniformity of Process Act, and that jurisdiction is not taken away by the act. It is said, however, that it ought to be presumed that this action was commenced in this Court; but, suppose there were one hundred cases before the Uniformity of Process Act, in which this form of declaration would have been proper, and that of those ninety-nine were excepted from the operation of the statute, would it be for the Court to presume that the case before them was the one case not excepted? As therefore the statute does not apply to cases removed from the Palace Court, or other inferior courts, we do not think the Court is to assume, that this is not one of those cases to which this act does not apply. It is no ground of demurrer, but a mere irregularity.

BRISCO *v.* STEVENS, T. T. 1824. C. P. 2 *Bing.* 213.

And must shew the cause of action to have arisen within the jurisdiction of the court.

IN this plea, all the proceedings in the plaint in the inferior court were set out, from which it appeared in the declaration in that plaint, that the plaintiff had declared that the defendant, being indebted within the jurisdiction of the court at Ludlow for goods sold, promised, within its jurisdiction, to pay the plaintiff, but did not in any count state that the goods were sold, or that the cause of action arose within the jurisdiction of that court. The plaintiff replied, that at the time he levied his plaint in the court at Ludlow, and from thence till the time of judgment was obtained in that plaint, both himself and the defendant were residing within the jurisdiction of that court; that the causes of action arose out of its jurisdiction, and that the Court had not at the time of levying the plaint, or at any time afterwards, jurisdiction over the causes of action. Demurrer and joinder in demurrer.

Per Cur.—We must take it, that the facts stated in the replication are true, and if so, the inferior court had no jurisdiction, for the plaintiff not only avers that the parties did not reside within the jurisdiction, but also that none of the causes of action arose there, both of which circumstances were necessary to confer jurisdiction.

BRUCE *v.* WAIT, E. T. 1840. C. P. 1 *Scott, N. S.* 181; S. C. 1 *M. & G.* 1.

And proceedings in an inferior court are contrary to law, if no previous summons issue to found them.

IN a suit, by foreign attachment, in the Tolsey Court, Bristol, it appeared, upon the record of the proceedings, that the action was commenced by attaching the defendant through his goods, in the possession of the garnishee, without a previous summons, and return nihil. On a writ of error from the judgment of the Tolsey Court of Bristol—

Per Cur.—It appears from this writ of error, that the action in the court below had commenced against Coombes by attachment, without summons. It was evident that he was neither summoned, nor inquired after. Now, it was but just and reasonable that notice of the proceedings should be given to him. The case cited from W. Blackstone and Wilson, (*Fisher* v. *Lane*), is quite sufficient to shew that the instituting of proceedings without notice is contrary to law.

WILLIAMS *v.* BAGOT, H. T. 1825. K. B. 3 *B. & C.* 772.

So, a custom in an inferior court, to summon and declare at the same time, and proceed to judgment without an appearance, is bad.

UPON error from an inferior court, it appeared by the record, that, in an action of debt, a summons and attachment issued at the same time, and were returnable at the same time, and neither of them was served personally on the defendant. At the return of these writs the plaintiff declared, and at a subsequent court had judgment by default; the defendant never having appeared, and no appearance having been entered for him. The recorder of the inferior court certified this to be the practice of the court, according to immemorial custom.

Per Cur.—It appears to us that the custom cited is bad. In personal actions, it must appear that the person of the defendant has been brought into court. In real actions, first, the petit cape issues, upon which the issues of the land sought to be recovered are taken; if the defendant does not appear to that process, the grand cape goes, upon which the land itself is taken, but that does not affect the defendant's person. In the superior courts, the summons is the first process in debt or covenant, trespass, &c.; an injury having been done, an attachment issues in the first instance. The party is attached by his goods, and if he does not appear, the plaintiff's complaint cannot be heard, but he may proceed by distress infinite; and even where a capias is issued, the sheriff brings the party into court if he can; if he cannot, then the plaintiff must proceed to outlawry. This is undoubtedly the course of practice in the superior courts, and if the right of declaring in the absence of the defendant, which is now contended for, can be supported on any legal principle, it is singular that it should not be within the power of the highest courts.

LAUGHTON *v.* TAYLOR, M. T. 1840. Ex. 8 *D. P. C.* 776; S. C. 6 *M. & W.* 695.

The defendant cannot plead a former suit pending in the mayor's court in Liverpool, to an action in the superior courts.

DEBT, for goods sold and delivered. The defendant pleaded, that before the issuing of the writ, and before the declaration, to wit, on &c., the plaintiffs, at the borough of Liverpool, in the county of Lancaster, impleaded the defendant in the borough court of Liverpool, then and there held before the mayor of the said borough of Liverpool, and thereupon then and there declared against him in the said court, for the non-payment of the very same identical debt sought to be recovered in this action, as by the record thereof more fully and at large appears. And the defendant further says, that the parties in this and the said former suit are the same, and not other or different persons; and that the said identical debt accrued to the plaintiffs within the jurisdiction of the said borough court of Liverpool, to wit, at the borough of Liverpool aforesaid, in the county of Lancaster aforesaid, and before the commencement of the said suit, in the said borough court of Liverpool, to wit, on &c.; and that the said borough court of Liverpool had, in every other respect, full power and jurisdiction to entertain, hear and determine the said last-mentioned suit, to wit, at the borough aforesaid, in the county aforesaid. And the defendant further says, that the said former suit so recommenced and prosecuted against him the defendant by the plaintiffs as aforesaid, is still depending and undetermined. Verification and prayer of judgment, that the writ and declaration might be quashed.

Special demurrer, assigning for causes that the pendency of an action in an inferior court cannot be pleaded to an action in a superior court.

Per Cur.—All that the act of Parliament (6 & 7 Will. 4, c. 135) says, is, that the court shall no longer be held before the mayor and bailiff, but before the mayor only; there is nothing in that to constitute it a superior court. The plea is bad.—Judgment for plaintiff.

III. RELATIVE TO COUNTY COURTS.—See also tit. *Mandamus.*

Rex *v.* Sheriff of Herefordshire, T. T. 1830. K. B. 1 *B. & Ad.* 672.

If there be two distinct debts, the defendant may be sued in the county court separately for each.

A. became indebted to B. in a sum not exceeding 40*s.* for the carriage of a parcel of goods, and in a month afterwards incurred another debt to B., not exceeding 40*s.*, for the carriage of a second parcel. A. brought two actions in the county court for the respective debts.

The Court held, that the causes of actions were distinct, and that he was entitled to sue separately for each demand, and refused a prohibition.

Jones *v.* Jones, M. T. 1839. Ex. 7 *D. P. C.* 841; S. C. 5 *M. & W.* 523.

A statement in a declaration on a judgment in the county court, that the cause was tried before "the sheriff and certain free suitors", is bad on demurrer*.

Debt, on a judgment recovered in the county court of Carnarvon. The declaration stated, that the cause of action arose within the jurisdiction of the court, and then alleged that "at the county court of Sir Richard Bulkeley William Bulkeley, Bart., then being sheriff of the said county, duly holden at Carnarvon, in and for the county aforesaid, and within the jurisdiction of the said court, before the said sheriff, and certain free suitors of the said court, the plaintiff, by the consideration and judgment of the said court, recovered," &c. On special demurrer—

Per Cur.—The word "before" the sheriff and suitors, means that the debt was recovered by the consideration and judgment of those persons, the lawfully constituted judges of the court, of which the sheriff was one. But the sheriff has no such authority; for suppose the suitors were to differ upon any case before them, and the sheriff were to give his casting vote, and thereby decide the question, the judgment would be bad. If a judgment recovered before the Court of Common Pleas were set out as a judgment recovered before the judges of that court, together with the Chancellor and the Judges of the other courts, it would be error, and the latter part could not be rejected as surplusage.

* The cause assigned at the end of the writ of pone is mere matter of form, and cannot be traversed by the sheriff. (*Talbot* v. *Binns*, 8 Bing. 71; S. C. 6 Moore & P. 148; S. P. *Parkes* v. *Newton*, 3 B. & Ad. 105; Abridged, post, tit. *Pone, Writ of.*

OVERTON *v.* SWETTENHAM, E. T. 1837. C. P. 5 *D. P. C.* 641; S. C. 3 *Bing. N. S.* 786.

The county-court book kept by the sheriff, being only notes of the proceedings, may be amended so as to state the practice of the court fully.

ON motion to compel a sheriff to complete his entries of proceedings in a county court and certify its practice, where in his return to a writ of false judgment only minutes of them have been transmitted—

Per Cur.—The entry in a sheriff's book is only a note of the various kinds of proceeding in the court below. The object of the present rule is similar to a proceeding on a writ of error; in which case, if all the record is not certified, a diminution of the record may be alleged, and a writ issued to the justices requiring them to certify the whole. The present rule must therefore be made absolute.

CHITTY *v.* DANTRY, E. T. 1835. K. B. 4 *N. & M.* 842; S. C. 3 *Ad. & E.* 319.

The statute of Anne, allowing several pleas, does not extend to a county court, not being a court of record.

ON a writ of false judgment given for the plaintiff in the county of Sussex, it appeared that the plaintiff had declared in debt for goods sold and delivered, and that the defendant had pleaded nil debet and a plea of set-off. The plaintiff in the replication took issue upon the plea of the general issue, but took no notice of the plea of set-off. A venire was awarded, and evidence was offered upon the plea of set-off, but rejected, and a verdict and judgment were given for the plaintiff on the general issue.

Per Cur.—It is a rule in pleading that a plea must not be double, and where the rule is not observed the plaintiff must demur to the plea if he mean to object to it on that account. If he does not demur he ought to reply to the whole, and not merely one part, leaving the other unnoticed; for it is uncertain which part of the plea the plaintiff means to rely upon. It is also a rule, that if the plaintiff does not answer the whole plea it amounts to a discontinuance of the action, if it be not such discontinuance as would be cured after verdict by the statute of 32 Hen. 8, c. 30. That statute, however, only extends to cases in the king's courts of record, and therefore the county court is not affected by it, consequently the discontinuance in the present case would not be cured by virtue of it. The rule which requires the plaintiff to demur where the plea is double, appears to apply only to cases where it is pleaded as one plea. In this case the general issue and a set-off are not pleaded as one, but they are distinctly pleaded as two pleas, for the second plea is pleaded by leave of the court according to the form of the statute; but the county court not being a court of record has no authority in point of law to give leave to plead several pleas, the stat. 4 & 5 Anne, c. 16, s. 4, being confined to courts of record. The plaintiff below, therefore, was not bound to take notice of the plea; and it cannot be said that it was not known which plea the defendant intended to rely upon, for as the first plea was complete, the plaintiff had a right to consider that as a complete plea upon which he might take issue. A court of error will take notice that a county court had no authority to give leave to plead double; and as a complete plea had been pleaded, we must consider the second plea as surplusage. We therefore, are of opinion, there is no error or false judgment in the court below, and the judgment of that court will be affirmed.

STROTHER *v.* HUTCHINSON, M. T. 1837. C. P. 6 *D. P. C.* 238; S. C. 4 *Bing. N. S.* 83; S. C. 3 *Scott,* 346.

A bill of exceptions may be tendered and acted upon in the county court.

ON the trial of this action in the county court of York, the sheriff and suitors being of opinion that the plaintiff had made out no case directed a nonsuit, notwithstanding the protest of the plaintiff, who required that the case should be submitted to the jury. The plaintiff then tendered a bill of exceptions, to which the sheriff and suitors set their seals, and the record having been removed into this Court by writ of false judgment—

Per Cur.—The question is, whether a bill of exceptions will lie on the judgment of a county court; and upon this subject there is the express authority of Lord *Coke* in his commentary on the Statute of Westminster, 2. He, it should be recollected, does not write carelessly or loosely upon the subject, but he gives his reasons for the conclusion which he has attained, and he says, "this act extendeth not only to all other courts of record, but to the county court, the hundred and court baron, for therein the Judges were more likely to err."

CROOKES *v.* LONGDEN, E. T. 1839. C. P. 5 *Bing. N. S.* 410; S. C. 7 *D. P. C.* 413.

The 19 Geo. 3, c. 70, only applies to causes removed before judgment, and therefore a return to a writ of false judgment, that the plaintiff in error has not given security for costs, is bad.

TO a writ of false judgment the sheriff returned, that the plaintiff in error had not given security to prosecute his suit with effect. A rule calling upon the sheriff of Yorkshire to shew cause why the return made to the writ of false judgment in this cause should not be set aside on the ground of its being insufficient—

Per Cur.—The rule must be absolute. This case turns upon the construction of the 19 Geo. 3, c. 70. The fourth, fifth, and sixth sections of that statute are all applicable to the same subject-matter; namely, causes brought in inferior courts for smaller sums than 10*l.* The fourth clause provides, that where the debt is under 10*l.*, and persons may to avoid execution remove their persons and estates beyond the jurisdiction of the court, the record of the judgment may be removed into the superior court in order that writs of execution may be issued to the sheriff of the county. The fifth section provides, that no execution shall be stayed or delayed upon or by any writ of error for the reversing of any judgment in an inferior court where the cause is for less than 10*l.*, unless the person in whose name the writ of error is brought shall, with two sureties, be bound by recognisance to prosecute the writ of error with effect and to satisfy and pay, if judgment be affirmed, all the debt, damages, and costs. Then the sixth clause takes up the provisions of that preceding it, and enacts, that no cause, where the cause of action shall be less than 10*l.*, shall be removed into any superior court, unless the defendant, who shall be desirous of removing it, shall enter into the like recognisance for payment of the debt and costs in case judgment shall pass against him. It appears to us, that this enactment clearly refers to a suit where judgment has not been given in the court below.

IV. RELATIVE TO COURTS OF EQUITY*.

V. RELATIVE TO COURTS LEET.

WILCOCK *v.* WINDSOR, M. T. 1831. K. B. 3 *B. & Ad.* 43.

A custom in a court-leet for a jury to examine weights, &c., and destroy the light ones, is good.

THE evidence proved a custom in a manor for the leet-jury to break and destroy measures found by them to be false. In a plea of justification grounded on such custom—

The Court held, 1st, it is enough to say that the measures were found by the jury to be false without alleging that they were so; and 2ndly, that the custom was valid in law.

WILCOCK *v.* WINDSOR, M. T. 1831. K. B. 3 *B. & Ad.* 43.

And by custom the Court may be adjourned after the jury are sworn, from April to December.

A COURT-LEET, holden on the 28th of April, was adjourned after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments.

The Court held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not necessarily unreasonable.

VI. RELATIVE TO COURTS MARTIAL.

MANN *v.* OWEN, E. T. 1829. K. B. 9 *B. & C.* 595.

Charging for stores not issued is an offence punishable by a court-martial.

IN trespass and false imprisonment against the president of a naval court-martial. The plea showed that the plaintiff was tried for an offence which at common law was an indictable misdemeanor; viz. fraudulently charging stores to seamen where none had been issued.

The Court held, that a purser in the navy was liable by the 22 Geo. 2, c. 33, to be tried by a court-martial for the offence, and that the action could not be maintained.

Covenant.

I. DEFINITION AND CREATION OF COVENANTS.

(*a*) IN GENERAL, p. 284.

(*b*) PARTICULAR KINDS OF COVENANTS.

1. *Conditional*, p. 285.
2. *Independent*, p. 285.
3. *Joint and several*, p. 286.
4. *Valid or illegal*, p. 287.

* Courts of equity have a concurrent jurisdiction with the county palatine of Lancaster. (*Cheetham* v. *Crook*, E. T. 1825, Ex. Equity, 1 M'Clel. & Y. 307).

II. PARTIES TO COVENANTS.

(*a*) In general, p. 287.

(*b*) In particular.

1. *Agents*, p. 287.
2. *Companies, Public*, p. 287.
3. *Husband and Wife*, p. 289.
4. *Infants*, p. 289.

III. OF THE CONSTRUCTION OF COVENANTS, AND PROVISOES.

(*a*) In general, p. 289.

(*b*) In particular.

1. *Agricultural*, p. 290.
2. *Assign, not to*, p. 291.
3. *Fine, to levy*, p. 291.
4. *As to Fixtures*, p. 291.
5. *To indemnify*, p. 292.
6. *To insure*, p. 292.
7. *In Marriage Settlements*, p. 292.
8. *Land, running with*, p. 292.
9. *Life, during*, p. 293.
10. *Quiet Enjoyment*, p. 293.
11. *To pay Rates and Taxes*, p. 295.
12. *Re-entry*, p. 296.
13. *To renew*, p. 297.
14. *To pay Rent*, p. 298.
15. *To repair*, p. 300.
16. *Not to sue*, p. 302.
17. *Not to carry on certain Trades*, p. 302.
18. *To yield up at the end of the Term*, p. 305.

IV. AS TO PAROL EVIDENCE EXPLAINING, OR CUSTOMS CONTROLLING, p. 306.

V. AS TO THE PERFORMANCE OF COVENANTS, AND WHAT SHALL BE CONSIDERED AS A BREACH AND WAIVER OF; AND OF THE DISCHARGE FROM COVENANTS, p. 307.

VI. REMEDIES FOR BREACH OF COVENANT.

(*a*) Actions, when and by whom maintainable, p. 309.

VI. REMEDIES FOR BREACH OF COVENANT—(*continued*).

(*b*) OF THE DECLARATION.

1. *As to the Venue*, p. 314.
2. *As to the Form of the Declaration, and of Variances*, p. 316.
3. *Amendment of*, p. 320.

(*c*) AS TO OYER, p. 321.

(*d*) PARTICULARS OF DEMAND, p. 321.

(*e*) OF THE PLEAS.

1. *In general*, p. 321.
2. *In particular.*

1.—*Fraud*, p. 324.

2.—*Limitations, Statute of*, p. 324.

3.—*Payment of Money into Court*, p. 325.

4.—*Adding Pleas*, p. 326.

(*f*) OF THE REPLICATION, p. 326.

(*g*) OF THE EVIDENCE, p. 327.

(*h*) WHO TO BEGIN, p. 328.

(*i*) RULE TO COMPUTE, p. 328.

(*k*) OF THE DAMAGES, p. 329.

(*l*) OF THE COSTS, p. 330.

I. DEFINITION* AND CREATION OF† COVENANTS.

(*a*) IN GENERAL.

SAMPSON *v.* EASTERBY, E. T. 1829. K. B. 9 *B. & C.* 505; *affirmed on error*, 6 *Bing.* 645.

A mere recital of an agreement in a covenant, without a covenant to perform, is binding as a covenant.

A LEASE of an undivided third part of certain mines contained a recital of an agreement, made by the lessee with the lessor, and the owners of the other two-thirds, for pulling down an old smelting mill, and building another of larger dimensions; and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it.

The Court held, first, that such recital of the agreement, followed by these covenants, did amount to a covenant in law to erect the

* A covenant is defined to be an agreement in a deed, by which one person obliges himself to do something beneficial, or abstain from something which, if done, might be prejudicial to another; and a great variety of agreements of this kind have been introduced into modern deeds. A covenant is generally to do something in futuro, and differs from the case where an agreement refers to a thing which is not to be done by the person of any one, but to a thing to be executed in itself; and where an agreement terminates in itself, it is not properly a covenant, but a defeasance.

† A covenant may be created by indenture or deed-poll. (*Green* v. *Horne*, E. T. 1694, K. B., 1 Salk. 197).

building; and secondly, that the covenant tending to the support and maintenance of the thing demised passed with the reversion, and that the assignee might therefore maintain the action.

(*b*) Particular kinds of covenants.

1. *Conditional.*

Dawson *v.* Dyer, M. T. 1833. K. B. 2 *N. & M.* 559; S. C. 5 *B. & Ad.* 584.

A covenant, that "the lessee paying rent shall quietly enjoy," is not a conditional covenant.

Covenant, that the plaintiff, paying the yearly rents thereby reserved on the several days and times, &c., and observing, performing, and keeping all and singular the covenants, conditions, and agreements therein contained, should and lawfully might peaceably and quietly have, hold, occupy, and enjoy the said messuages, with the appurtenances, for and during the said term of fourteen years; determinable, nevertheless, as thereinafter is mentioned, without any let, suit, trouble, eviction, or interruption of, from, or by the defendant, his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, from, or under him or them. Breach: that H. B., lawfully claiming by, from, or under the defendant, entered into and upon one of the demised premises. On demurrer, the only question was, whether the payment of the rent by the tenant is a condition precedent to the performance of the covenant for quiet enjoyment on the part of the landlord.

Per Cur.—The covenant for quiet enjoyment was not conditional; and there must, therefore, be judgment for the plaintiff.

---

2. *Independent.*

Carpenter *v.* Creswell, M. T. 1827. K. B. 4 *Bing.* 409; S. C. 1 *M. & P.* 66.

A covenant to pay an annuity in consideration of a share in a business, and a covenant not to interfere, are independent covenants.

The plaintiff, by indenture, reciting that he had for many years carried on the trade of a fish-factor, &c., and that he had an interest in certain fisheries in Scotland, assigned to the defendant a certain branch of his trade, together with his interest in the fisheries, with a covenant that he would not in any manner interfere therewith; and the defendant thereupon covenanted to pay to the plaintiff an annuity of 250*l.* In an action for the non-payment of the annuity, the defendant pleaded that the plaintiff did interfere with the trade which he had assigned to the defendant. On demurrer—

The Court held, that the covenant by the defendant to pay the annuity, and that by the plaintiff not to interfere with the branch of the trade assigned, were distinct and independent covenants.

Stavers *v.* Curling, M. T. 1836. C. P. 3 *Bing. N. S.* 355; S. C. 3 *Scott*, 740.

A covenant by A. to proceed on a voyage, and obey all instructions, in

Articles of agreement between the owners of a South Sea whaler and the master contained covenants by the latter, that he would proceed to the southern whale fishery, procure a cargo of sperm oil, &c., or as great a proportion thereof as circumstances

consideration of B. paying him a proportion of the proceeds, are independent covenants.

would permit; and having done so, would return in and with the said ship to the port of London, and there, at his own cost, together with the crew, discharge and deliver the cargo to the owners; that he would obey whatever orders might be received from the owners, and would be frugal of the stores of the ship, and would on no account whatever smuggle, or permit it directly or indirectly, whereby the owners might be injured, binding himself to indemnify the owners in case of loss or damage thereby; and the owners covenanted, that, on the performance of the before-mentioned terms and conditions, they would pay to the master one-twelfth part of the net proceeds of the cargo, &c.

The Court held, that the performance of the master's covenant was not a condition precedent to his right of action against the owners, but that the covenants were independent: and, consequently, that, in an action for the non-payment of the master's proportion of the proceeds of the cargo, for work and labour, &c., pleas, that the plaintiff did not pay strict attention to the preservation of the stores; that he traded in such a manner as that the owners were prejudiced; that he did not use his best exertions to procure a cargo; and on divers days was drunk and intoxicated, and suffered disorder and irregularity in the vessel, were bad on demurrer.

MATTOCK *v.* KINGLAKE, E. T. 1839. K. B. 10 *Ad. & E.* 50; S. C. 2 *P. & D.* 343.

Under a covenant to purchase and pay at a certain time, if independent, the conveyance need not be tendered.

ON the sale of an estate by A. to B., in August, 1822, it was agreed by B. to pay on or before the 19th February, 1825, as the consideration, &c., 11,206*l.*, with interest at the rate of 5*l.* per cent., payable half-yearly, from the 19th of February to the time of the completion of the said purchase, A. allowing thereout the same rate of interest, for so much of the purchase-money as might be paid to him in the mean time; and B. agreed to pay for the conveyance and the stamps.

The Court held, that these were not concurrent conditions, and that A. might maintain an action for the purchase-money, without averring a previous tender of a conveyance; and that a plea, setting up that there had been no such tender, was no answer to the action.

---

3. *Joint and Several.*

COPELAND *v.* LAPORTE, 1836. K. B. 3 *A. & E.* 517.

A covenant by L. to pay rent, and by the defendant to secure it, is a joint covenant that both shall pay.

UPON a lease of premises to L., reciting that the defendant agreed to enter into the covenant for securing the payment of the rent; and the lease then stated the agreement to demise to be in consideration of the covenants by L., and of the covenant entered into by the defendant, and then followed the usual covenant—

The Court held this to amount to a joint covenant that both should pay the rent, and that L. should keep the premises in repair, and that the defendant was jointly liable with L. to repair as well as to pay the rent.

4. *Valid or Illegal.* See also post, div. *Not to carry on certain Trades,* p. 302.

WALSH *v.* FUSSEL, T. T. 1829. C. P. 6 *Bing.* 163; S. C. 3 *M. & P.* 457.

A COVENANT with a lessor of premises in a parish to indemnify the parish against any paupers which the covenantor may cause to be settled in it—

The Court held valid, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws.

A covenant to indemnify the parish against a servant becoming chargeable to the parish is legal.

II. PARTIES TO COVENANTS.

(*a*) IN GENERAL.

SMITH *v.* POCKLINGTON, E. T. 1831. Ex. 1 *C. & J.* 445; S. C. 1 *Tyrw.* 309.

THIS was an action of covenant against A. and B. on a covenant supposed to be implied as incident to a demise by lease. On production of the lease it appeared, that, in point of law, A. only demised, and B., who had an equitable interest, merely confirmed.

Per Cur.—On the production of the lease, it appears that one defendant was mortgagee, and the other entitled only to an equity of redemption, so that the deed operates as a demise by one, and an equitable confirmation by the other.

No covenant can be implied from a party having the equity of redemption joining, so as to render him liable.

(*b*) IN PARTICULAR.

1. *Agents.*

BERKELEY *v.* HARDY, E. T. 1826. K. B. 5 *B. & C.* 355; S. C. 8 *D. & R.* 102.

IN an action of covenant, it appeared that the deed was expressed to be made by A. on the behalf of B., of the one part, and C., of the other; A. being authorized in writing, but not under seal, to execute the same for him, and the agreement, reddendum, and covenants were expressed to be between B. and C. only, but A. executed the deed in his own name only.

The Court held, that B. could not maintain covenant on the deed, and the Court would not upon the production of an insufficient instrument presume the existence of another which would be sufficient.

A written authority not under seal does not authorize an agent to execute a deed.

2. *Companies, Public.*

HANCOCK *v.* HODGSON, T. T. 1827. C. P. 4 *Bing.* 269.

THE defendants, as directors of a mining company, having purchased mines, covenanted to pay the purchase-money by instalments, within twelve months, out of the monies to be raised by the company, with a proviso, that in case there shall not have been received by the bankers of the said company, or by the directors for

Where directors covenant to pay by instalments, and on the last, six months time is

to be given, if the shareholders have not paid their shares the directors are personally liable at the expiration of that time.

the time being, the deposits or instalments due from the several shareholders, so as to enable the said directors to pay the balance on account of the said purchase-money at the times hereinbefore mentioned, then and in such case the said directors shall be allowed and are hereby allowed a further time to pay such balance until six months after the time or times when the said quarterly instalments become due. They then covenanted as follows:—"And the said directors, parties hereto, do hereby promise and agree, that out of the said payments so to be made by the subscribers or shareholders of the said company, they will pay or cause to be paid unto the said E. G. Hancock and R. Vazie the said purchase-money or sum of 4500*l.*, or so much thereof as shall remain due and payable, according to the terms and at the times before specified, subject nevertheless to the aforesaid provisoes and conditions." Breach, non-payment, according to the covenant. On demurrer to the pleas—

Per Cur.—The cases of *Dawkes* v. *De Loraine*, (3 Wils. 207), and *Jenny* v. *Herle*, (2 Ld. Raym. 1361), merely shew that instruments directing or promising payment out of a particular fund are not negotiable as bills of exchange or promissory notes; but in this case there can be no doubt of the personal responsibility of the defendants. Their agreement provides, that they shall pay to the plaintiffs at the time of the execution of it the sum of 300*l.*, the further sum of 200*l.* on or before the 22nd of August, the further sum of 500*l.* on or before the 3rd of October, and the balance of 3500*l.* within twelve months from the date of the agreement, with a proviso, that, in case they should not within that time have received from the shareholders a sufficient sum for the purpose, they then shall be allowed a further indulgence of six months. This is a positive agreement to pay in twelve months, if the particular fund should be adequate, or, if not, in eighteen months at all events. —Judgment for the plaintiffs.

HALL *v.* BAINBRIDGE, E. T. 1840. C. P. 8 *D. P. C.* 583; S. C. 1 *M. & G.* 42; S. C. 1 *Scott, N. C.* 151.

A subsequent chairman of a company is not liable on a deed entered into by a former, though for the purposes of the company.

THE plaintiff declared in covenant against the defendant, as chairman of the board of directors of a public company, not incorporated by act of Parliament, upon a contract under seal, entered into between him and one J. S., "for the time being acting as chairman of the said company." There was no allegation that the defendant was a partner in the company.

Tindal, C. J.—It does not appear upon the face of the declaration that the defendant is a partner in the company at all. There is no ground shewn for an action of covenant; whether assumpsit would lie, I give no opinion.

POULET *v.* BASINGSTOKE CANAL COMPANY, H. T. 1837. C. P. 3 *Bing. N. S.* 435; *S. C.* 4 *Scott*, 157.

And where the proprietors raise money under a local navigation act, as such it is not a personal covenant,

A CANAL company were authorized by statute to raise money, by an instrument under their common seal, upon the security of the undertaking, rates, duties, &c., by way of mortgage, so as that all who advanced money should be creditors in equal degree, and no preference be given to any in respect to the priority of advancing their money or the dates of their securities. It was provided in the

deed-poll given in pursuance of the statute, by which money advanced by the plaintiff to the company was secured, that the interest should be paid half-yearly. The assets of the company not being sufficient to discharge all their debts—

and they are not personally liable.

The Court held, that an action of covenant against the company for arrears of interest was not maintainable, the plaintiff's remedy being against the undertaking, rates, duties, &c., under the statute.

---

3. *Husband and Wife*.*

4. *Infants.*

GILLON *v.* LILLIE, E. T. 1835. C. P. 1 *Bing. N. S.* 695.

To an action of covenant on an annuity deed, whereby A. and B. did covenant, promise, and agree to pay the annuity, plea, that A., in the said indenture named, at the time of the making of the indenture, was an infant within the age of twenty-one years, to wit, of the age of twenty years, whereby, and according to the statute in such case made and provided, the said indenture was and is void in law. On demurrer—

Under a joint and several covenant, one covenantor being an infant does not discharge the adult.

Per Cur.—If this was merely the joint grant of an annuity made by the defendant and an infant, it may be said that the contract, being void as to part, should be so altogether; but when we look at the form of the deed, we find it to be the separate grant by each of an annuity. Each covenants severally to pay, and there is no reason that the covenant should be void against one who is of full age, because it is void against one who is not of full age.

III. CONSTRUCTION OF COVENANTS AND PROVISOES.

(*a*) IN GENERAL.

MAYOR OF LIVERPOOL *v.* TOMLINSON, 7 *D. & R.* 556.

AN action of covenant disclosed, that, at the time of the conveyance of premises abutting on a street, the intention of the parties appeared clearly to prevent any access to the street from any warehouse on or abutting upon the land conveyed. And the purchaser covenanted, "that he would not permit or suffer any warehouse to be opened or put out to the front of the street."

In construing a covenant, the intention of the parties will be taken into consideration.

The Court held, that the opening a warehouse door from adjoining premises, giving access to the street, was a breach of the covenant, though such door was not made on the premises conveyed, nor on a line with the street, but eight feet distant from the point.

MILNER *v.* HORTON, M. T. 1824. Ex. 1 *M'Clel.* 647.

COVENANTS in an indenture of sale, that the covenantors were seised of a good estate in fee-simple, and had good right, &c., to convey.

If covenants be in the conjunc-

* A covenant in a marriage settlement, that the husband will bequeath his real and personal estate to his children, only comprehends that which he is possessed of at the time of his death. (*Needham* v. *Smith*, 4 Russ., Ch., 318.)

tive, one may restrain and limit another.

The Court held them to be qualified and restricted by a subsequent covenant for quiet enjoyment, without any let, &c., by them, their heirs, or other persons claiming under them, because those covenants should be taken in conjunction with that for quiet enjoyment, without any let or disturbance by the parties, or either of them, or their heirs, or any person or persons claiming under them; and that you are not to detach a part which answers your purpose, and give it a construction independent of and inconsistent with the remainder of the provisions.

BURTON *v.* BARCLAY, M. T. 1830. C. P. 7 *Bing.* 745.

An under-lease remains in force against the lessee, although he reconveys to his original lessor.

A LEASE was granted for twenty-one years. The lessee sublet the premises to M. for the term, wanting twenty-one days, and afterwards assigned all his interest in the under-lease and reversion to the original lessor; which the latter assigned, with all his interest, in fee to the plaintiffs by way of mortgage. M. also afterwards assigned all his interest in the term granted to him to the defendants by way of mortgage, but the latter never entered.

The Court held, first, that the intermediate interest in the under-lease, carved out of the original lease, still remained as a barrier between the original term and the under-lease, and that the immediate reversion did not merge into the larger estate; secondly, that it was not necessary that the original lessor should have been the grantee of the whole of his immediate lessee's reversion, in order to enable him to sue upon the covenants incident to that reversion; and lastly, that the defendants having received the lease in pursuance of the assignment to them, they became legally possessed, and their legal liability as assignees could not be affected by any trust created in the deed of assignment. The plaintiffs were therefore entitled to sue on the covenants in such under-lease for rent.

BOYS *v.* ARNOLD, E.T. 1838. C. P. 5 *Bing. N. S.* 390.

A covenant, whereby the parties bind themselves in a penalty, to be forfeited as liquidated damages, is still a penalty.

ON an agreement between the plaintiff, on one part, and the defendant, with others, on the other part, for the execution of a lease, with the usual covenants, and for the performance thereof, each of the parties did bind himself in a penalty, to be recovered as liquidated damages.

The Court held, that on default that sum must be deemed a penalty, and not liquidated damages.

(*b*) IN PARTICULAR.

1. *Agricultural**.

* Where a lessee covenanted not to dig gravel out of any part of the demised premises without consent of the lessor, or paying him 10*s.* a load, except what should be dug out of two acres, part of the premises demised; and by indorsement on the lease before execution, it was agreed that the lessor might let any part of the demised premises for the purpose of making bricks, he paying the lessee 3*l.* for every acre so to be let; and further, that the lessee might dig for gravel any part of the demised premises, he covenanting to pay 20*l.* for every acre he should so dig, and make good the same:—It was held that the lessee was not entitled to dig for gravel in the two acres without making them good. (*Flint* v. *Brandon*, T. T. 1804, C. P., 1 N. R. 73).

The Court decided that a covenant, that J. S. should elect twenty of the best

2. *Assign, not to**.

3. *Fine, to levy*†.

4. *Fixtures.*

MARTYR *v.* MADLEY, T. T. 1832. C. P. 9 *Bing.* 26.

Under a covenant to leave all fixtures and "improvements," the word "improvements" comprehends mill-stones.

IN an action of covenant, it appeared that a lessee of a mill covenanted to leave, at the end of his term, such water-mill, with all fixtures, fastenings, and improvements, during the demise fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted. During the term he substituted a new pair of French mill-stones for a pair of old peak-stones.

The Court held, that under the term "improvements" such new stones were included; although by the custom of the country he was justified in removing such stones, replacing the old ones.

EARL OF MANSFIELD *v.* BLACKBURNE, E. T. 1841. C. P. 6 *Bing. N. C.* 427; S. C. 8 *Scott*, 820.

So, under a covenant to deliver up buildings &c., then

LESSOR demised to lessee certain premises and salt-mines, with liberty to make and erect warehouses and quays, and to make salt-pits and other works, and reserving amongst other rents a certain

trees within eleven years, was broken, by the covenantor's cutting trees within that period, even for housebote; (*Motteram* v. *Jolly*, T. T. 1675, K. B., 1 Vent. 271; S. C. 3 Keb. 477, 493; S. C. 2 Lev. 142; S. C. Freem. 397, nom. *Moterton* v. *John*); and that a covenant by a lessee, to grind all his corn at his lessor's mill, was not restrained to the corn grown on the premises; (*Hamley* v. *Hendon*, M. T. 1699, K. B., 12 Mod. 327); and where A. covenanted to pay 5*l.* for every acre ploughed, eared, or converted into tillage during the last twenty years of the term granted, the sum was payable for every acre, whether first ploughed within the twenty years or before that time. (*Birch and Others* v. *Stevenson and Others*, E. T. 1811, C. P., 3 Taunt. 469).

* *Semble*, that where there is a covenant not to assign, except by will, without leave of lessor, executors cannot assign for payment of debts without leave. (*Lloyd* v. *Crispe*, M. T. 1813, C. P., 5 Taunt. 249). And if a lessee covenants for himself, his executors, and administrators, not to assign, and becomes bankrupt, and afterwards acquires the demised premises, though the assignee of his assignees again assigns, this is no breach of his covenant, as he is in of an entirely new estate, and the covenant did not mention assigns. (*Doe* d. *Cheere and Others* v. *Smith*, M. T. 1814, C. P. 5 Taunt. 795; S. C. 1 Marsh. 359). But an assignment without leave by the assignees of a bankrupt lessee, is not within the meaning of a covenant by the lessee for himself, his executors, administrators, and assigns, not to assign without leave of the lessor. (*Doe* d. *Goodbehere* v. *Bevan*, H. T. 1815, K. B., 3 M. & S. 353; S. P. *Doe* d. *Cheere and Others* v. *Smith*, M. T. 1814, C. P. 5 Taunt. 795, S. C. 1 Marsh. 359). Covenant not to assign the land let, or any part, is broken by an assignment of part, although the lessor had previously entered into the other part. (*Collins* v. *Sillze*, E. T. 1651, K. B., Sty. 205). But a covenant not to assign without license is not broken by the lease being taken in execution under a warrant of attorney given for a just debt by the lessee. (*Doe* d. *Mitchinson* v. *Carter*, M. T. 1798, K. B., 8 Term Rep. 57; S. P. *Elliot* v. *Edwards*, T. T. 1802, C. P., 3 B. & P. 181).

† A person covenanting to levy a fine cannot be compelled to acknowledge a fine of other lands than those comprised in the covenant, though if the covenant contain a few more acres only, it is no ground for refusal; and a plea to the above effect is good in bar; (*Grigg's case*, E. T. 1739, C. P., 7 Mod. 293; S. C. nom. *Danby* v. *Gregg*, Willes, 150); and such a covenant runs with the land; (*King* v. *Jones and Another*, E. T. 1814, C. P., 5 Taunt. 418; S. C. 1 Marsh. 107; S. C. in error, 1815, K. B., 4 M. & S. 188).

standing or to be erected as salt-works, includes newly erected salt-pans set up and parcel of the brick-work.

sum per annum for each and every salt-pan, which had been or thereafter should be erected, worked, and made use of by the lessee in making salt; and the lessee covenanted to leave all such buildings, quays, and works, in good repair at the end of the term.

The Court held, that salt-pans made of iron plates set up on brick-work, with rings for lifting them off when required to be prepared, and iron pipes and troughs partly carried under ground, and partly supported by tressels, were comprised in the covenant, such works being essential to the existence of the salt-works demised, and the tenant therefore not entitled to remove them.

---

5. *To Indemnify*.*

6. *To Insure.*

DOE *d.* FLOWER *v.* PECK, M. T. 1830. K. B. 1 *B. & Ad.* 428.

A covenant to insure is a continuing covenant, and therefore a distress, though a waiver at that time, is not a waiver of a subsequent breach of covenant to insure.

BY the terms of the lease, the lessee was to insure and keep insured the premises demised, and deposit the policy with the lessor. There was the usual clause of re-entry on non-performance of the covenants. The lessee never insured, but assigned the premises, and the assignee never insured. The lessor distrained for rent due from the assignee, and afterwards brought ejectment for the forfeiture by the not insuring, laying the day of the demise in his declaration of ejectment a few days after he had so distrained.

The Court held, first, that the lease was conditional, and therefore, whether the covenant to insure ran with the land or not, (so as to subject the assignee to an action), the lessor was entitled to re-enter, on the forfeiture for condition broken; secondly, that the covenant to insure and keep insured was a continuing covenant, and although the distress for rent was a waiver of the forfeiture up to the time, the lessor might recover for the forfeiture incurred each day afterwards, and therefore the above ejectment was well brought.

---

7. *In Marriage Settlements.* See post, tit. *Marriage.*

8. *Land, running with.*

FLIGHT *v.* GLOSSOP, T. T. 1835. C. P. 2 *Bing. N. S.* 125.

A covenant, that the plaintiff should have two boxes in the defendant's

COVENANT by the lessees of a theatre to repay a sum of money lent, provided certain persons were alive on a particular day, and that the lender should have the free use and enjoyment of two private boxes in the theatre during that period.

* Poor rates are not included within a covenant to indemnify against all duties, charges, and taxes, to be imposed on the lands. (*Case* v. *Stephens*, T. T. 1732, C. P., Fitzgib. 297). A covenant to save harmless extends only to evictions upon elder title, and not to evictions by wrong. (*Nicholas* v. *Pullin*, M. T. 1662, K. B., 1 Lev. 83; S. C. 1 Keb. 379, 380, 413; S. P. *Anonymous*, E. T. 1774, K. B., Lofft, 460). So, a covenant by an assignee, to indemnify his assignor against all covenants, &c. contained in the original lease, extends only to legal, not tortious incumbrances. (*Cowper* v. *Pollard*, M. T. 1629, K. B., Sir Wm. Jones, 197; S. P. *Baylie* v. *Hughes*, E. T. 1632; Ibid. 242). But a covenant against a particular person extends to tortious acts. (*Perry* v. *Edwards*, E. T. 1720, K. B., 1 Stra. 400; S. P. *Nash and Another* v. *Palmer*, M. T. 1816, K. B., 5 M. & S. 374; S. P. *Fowle* v. *Welsh*, M. T. 1822, K. B., 1 B. & C. 29; S. C. 2 D. & R. 133).

Per Cur.—This is a mere personal covenant, and appears to have been a mere cloak for a usurious dealing. The parties wanted the loan of a sum of money for a year: they are to have it; and the use of the boxes is thrown in, to give a greater interest. Whatever remedy there may be against the immediate parties to it, there is none against the assignee.

theatre until a certain sum of money was repaid, does not run with the land.

---

9. *Life, during.*

RANDLE *v.* LEVY, H. T. 1838. Q. B. 6 *A. & E.* 218.

THIS was an action of covenant on a demise for lives; a forfeiture was to take place, in case the lessee did not produce one of the lives named (living abroad), or otherwise make it appear by a sufficient certificate that he was living.

The Court held, that an affidavit, shewing by circumstances that he was alive within seven years, was not a sufficient compliance with the terms of the covenant.

A covenant to hold for the life of A. B. is not satisfied by an affidavit that he was alive abroad, within seven years.

---

10. *Quiet Enjoyment.*

ADAMS *v.* GIBMAY, T. T. 1829. C. P. 6 *Bing.* 656.

TENANT for life, with remainder over, by indenture demised to the plaintiff, his executors, administrators, &c., for a term of fifteen years, without any express covenant for quiet enjoyment; and dying before the term expired, the plaintiff was ousted by the remainder-man.

The Court held, that the executor of the tenant for life was not chargeable with the covenant at law; and no covenant could be implied from the recital of the agreement for a lease for fifteen years, subject to the covenants thereinafter contained, the demise by indenture being the completion and performance of that agreement.

A covenant for quiet enjoyment cannot be implied; it must be express.

LINE *v.* STEPHENSON, T. T. 1838. C. P. 4 *Bing. N. S.* 447; *affirmed on error*, 5 *Bing. N. S.* 183.

COVENANT. The lessor demised, leased, and to farm let certain premises for a term, for which he was not entitled to lease; and the indenture contained a covenant that the plaintiff should quietly enjoy, &c., during the term, without let, suit, trouble, hinderance, or interruption whatsoever, by or from the lessor, his executors, administrators, &c., or any person or persons claiming, or to claim from, through, under, or in trust for him, them, or any of them.

The Court held, that an action could not be maintained upon the general covenant implied by the word "demise;" and that the lessor had power to demise for the term, such general covenant being restricted by the express covenant for quiet enjoyment which followed.

A general covenant is restrained by an express covenant for quiet enjoyment.

WOODHOUSE *v.* JENKINS, M. T. 1832. C. P. 9 *Bing.* 431; S. C. 1 *M. & Scott*, 599.

A CASE from the Vice-Chancellor disclosed that a tenant for life and his eldest son, the remainder-man in tail, granted premises to

A remainder-man evicting

under a covenant for quiet enjoyment against the "acts, means, neglect, default," &c., does not constitute a right of action.

E. S. for ninety-nine years, and gave E. S., the lessee, who knew their title, a bond conditioned for the due observance of this covenant for quiet enjoyment. E. S. underlet the premises to W. for sixty years, and covenanted with him against eviction by any one claiming under him, E. S., or by his acts, means, consent, neglect, default, privity, or procurement. The tenant for life and remainder-man having died without issue, and W. having been evicted by the next remainder-man in tail, the question was, whether the plaintiff was entitled, in respect of the said eviction, to maintain an action of covenant upon the said indenture of lease?

The Court certified that E. S. was not liable on his covenant to W., the eviction having been by title paramount, which E. S. had no means of defeating.

STANNARD *v.* FORBES, E. T. 1837. K. B. 1 *N. & P.* 633.

A covenant by a lessee, that his assignee shall enjoy, &c., as long as A. should live; A. had died before the assignment, which the lessee knew:—Held, he was not liable on A.'s eviction.

IN covenant, it appeared that J. L., by an indenture, reciting that he was possessed of a term for years provided one C. should so long live, granted and assigned the term to S., and covenanted that, notwithstanding any act, deed, matter, or thing done by him at any time heretofore, the lease was at the time of the assignment a good, valid, and effectual lease, and that the same, and the term of eleven years therein expressed, was in full force and effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudiced in any manner howsoever, otherwise than by effluxion of time; and also, that for and notwithstanding any such act, he, the said J. L., had full power to assign; and also for quiet enjoyment against all acts done by or through him. Before the assignment, C. had died, and J. L. knew the fact.

The Court held, first, that the covenant, that the lease was valid, and that the term was not determined, was qualified by the preceding covenant, and restrained to any acts done by J. L.; and that, therefore, he was not liable upon this covenant for an eviction by the party entitled on C.'s death.—After C.'s death, J. L. paid rent to the reversioner, and thereby created a tenancy from year to year, previous to the assignment:—Held, secondly, that this could not be treated as an act done by the covenantor within the meaning of the qualifying words.

NEWTON *v.* ALLEN, E. T. 1841. Q. B. 1 *Gale & D.* 44.

An eviction is no answer to a breach of other covenants.

COVENANT. The declaration stated that, on the 1st of December, 1837, by a certain indenture between the plaintiff and the defendant, the plaintiff demised and leased to the defendant, his executors and administrators, certain messuages, tenements, hereditaments, and premises, with the appurtenances, to hold from the 25th of March then last for thirteen years thence next ensuing, at the yearly sum of 160*l.*, with the following covenants by the defendant: first, that he would during the term well and sufficiently repair, and keep in repair, the demised premises, and every part thereof, and leave and yield them up in good repair; secondly, that he would not plough, break up, or convert to tillage any part of the meadow-land belonging to the demised premises, without consent in writing of the plaintiff; thirdly, that he would not depasture the orchards, except with certain specified cattle; fourthly, that he would not top or lop the trees, woods, plantations, &c., and only cut the hedges at sea-

sonable times; fifthly, that he would not assign or underlet the demised premises, or any part thereof, or otherwise depart with the indenture, without the consent of the plaintiff in writing first had and obtained. The declaration then stated the entry of the defendant upon the demised premises, and that he was possessed of the term, and then assigned breaches in respect of all the covenants above set out; the last breach being, that during the continuance of the term, and before the commencement of the suit, to wit, on the 25th of March, 1839, the defendant, without the consent of the plaintiff in writing first had and obtained, underlet a part of the demised premises unto one Lias Martin, who, by virtue of such underletting, entered into, and became and was possessed of the said part of the said premises so underlet to him as aforesaid, contrary to the effect of the indenture, &c. The defendant pleaded that, before any of the alleged breaches, and during the continuance of the term, he was evicted from an outhouse, garden, and court-yard, parcel of the demised premises, by authority of the landlord.

The Court held the plea no answer to the declaration, and said, whether the replication de injuriâ was admissible to this plea, on the ground that the plea contained matters of excuse, and not of discharge, they need not decide.

---

11. *To pay Rates and Taxes*.*

BENNETT *v.* WOMACK, H. T. 1828. K. B. *7 N. & C.* 627; S. C. 1 *M. & Ry.* 444.

Covenants to pay land-tax and sewers-rates are usual covenants.

AN agreement was for an assignment of the lease of a public-house, which was described as holden at a certain net rent, upon usual and common covenants; and it appeared that the lease contained a covenant by the tenant to pay the land-tax, sewers-rates, and all other taxes, and a proviso for re-entry, if any other business than that of a victualler should be carried on in the house. And it appeared that a considerable majority of public-house leases contained these provisions—

The Court held, that they were fairly described in the agreement as usual covenants. The phrase, "usual covenants," in an agreement touching a lease, may be explained by reference to the nature of the premises and the general practice with regard to leases of premises of that description.

* A covenant to pay taxes on land does not include church and poor's rates. (*Theed* v. *Starkie*, M. T. 1725, K. B., 8 Mod. 314). And where a lease was made rendering rent free from all taxes and impositions, these words were construed to extend to taxes imposed by Parliament. (*Giles* v. *Hooper*, E. T. 1690, K. B., Carth. 135; S. P. *Anon.*, T. T. 1693, K. B., Comb. 211; S. P. *Arran, Count of*, v. *Cash*, T. T. 1694, K. B., 12 Mod. 54; S. C. Salk. 221; S. C. Holt, 549). But a covenant on a demise by a bishop, for himself and successors, to pay all public taxes on the land, does not extend to a tax afterwards assessed by act of Parliament. (*Davenant* v. *Bishop of Salisbury*, M. T. 1672, K. B., 1 Vent. 223; S. C. 3 Keb. 69; S. C. 2 Lev. 68). Where, however, there is not any express agreement to the contrary, the tenant may deduct out of his rent land-tax paid by him, (*Cranston* v. *Clarke*, H. T. 1753, Sayer, 78), in proportion to the quantum of rent only. (*Whitfield* v. *Brandwood*, M. T. 1818, N. P., 2 Stark. 440).

WATSON *v.* HORNE, M. T. 1827. K. B. 7 *B. & C.* 285; S. C. 1 *M. & Ry.* 191.

Under a covenant by lessor to pay all taxes, if the premises be improved with his consent, and thereby further taxes be charged, he is only to pay in proportion to the rent.

IN a lease of land it was covenanted by the lessee, that he would not, without the previous consent of the lessor, erect any buildings on the same; and by the lessor, that he would "pay and discharge as well the land-tax as all other taxes, charges, rates, &c. charged or to be charged upon or in respect of the said demised land;" and the lessor on the day of executing the lease also granted a license for building:—

The Court held, that the lessor was not liable to pay the taxes assessed upon the improved value of the land occasioned by the buildings erected thereon, but only in proportion to the amount of the rent for which he had let the land. The general rule in the construction of such covenants is, that the landlord shall be held liable only in proportion to the amount of the rent which he receives.

---

12. *Re-entry.*

DOE *d.* ABDY *v.* STEVENS, H. T. 1832. K. B. 3 *B. & Ad.* 299.

A proviso for re-entry if the lessee should "do or cause to be done any thing, &c." does not apply to an omission, as, not to repair.

INDENTURE of lease, with a proviso for re-entry if the rent should be in arrear for the space of fourteen days after the day of payment, or if the lessee should assign, or if the lessee, his executors, &c., or any of them, should do or cause to be done any act, matter, or thing whatsoever, contrary to or in breach of one or more of the covenants or agreements thereinafter mentioned—

Bayley, B., before whom the cause was tried, thought that the omission to repair, which constituted the breach complained of, was not a breach of covenant within the proviso for re-entry, being of opinion that that proviso extended only to acts of commission and not to acts of omission merely, and therefore nonsuited the plaintiff, at the same time giving him leave to move to enter a verdict.

Per Cur.—The lessee in this case covenants in the usual way for the payment of rent, to repair, uphold, and maintain the premises, to insure, not to permit or suffer any alteration to be made on any part of the premises. The lease also contains a covenant not to assign, and a proviso, that if the rent should be in arrear for the space of fourteen days after the day of payment, or if the lessee should assign, or if the lessee, his executors, &c., should do or cause to be done any act, matter, or thing whatsoever, contrary to and in breach of any one or more of the covenants or agreements thereinafter mentioned, the lessor should have the power of re-entry. This clause of re-entry being in this special form, providing as it does distinctly for the case of non-payment of rent, or of the lessee's assigning, we are of opinion that the mere omission to repair is not the doing of an act within the latter words of the provision. We are therefore of opinion, that the motion to set aside the nonsuit should be discharged.

DOE *v.* DAND, M. T. 1834. Ex. 1 *C., M. & R.* 405; S. C. 5 *Tyrw.* 405; S. C. 6 *C. & P.* 614.

A covenant, that if the lessee or

A LEASE was granted in 1816 by C. L. Harris, Esq., to Joseph Waters, of a house and premises in the parish of Eglwys Commin,

for twenty-one years, at a rent of 88*l.* The lease contained among others a covenant not to set, let, demise, or assign the premises, or bargain, sell, transfer, assign, or set over the lease, without the license and consent of the said C. L. Harris first had and obtained in writing. Several other covenants then followed, and provisoes for re-entry, and then came this proviso: "Provided also, that if the said Joseph Waters, his executors, administrators, and assigns, shall become bankrupt or bankrupts, insolvent or insolvents, or shall suffer any judgment or judgments to be entered against him or them the said Joseph Waters, his executors, administrators, or assigns, by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability may arise of the said herein and hereby demised estate, or any part thereof, being extended or taken in execution," that then the said lease should cease and determine, and a right of re-entry should accrue. It appeared that Joseph Waters, the lessee, was a gentleman of large property, who carried on considerable agricultural dealings, and died in 1823, having appointed John and Robert Waters his executors. Robert died in 1827, leaving John the sole surviving executor. John Waters was a banker at Caermarthen, and in 1832 became bankrupt, and a fiat of bankruptcy issued against him.

his executors should become bankrupt*, the lessor might re-enter:—Held, to extend to an executor who carried on trade and became bankrupt.

Parke, B., was of opinion that the forfeiture had been incurred; and directed the jury to find their verdict for the lessor of the plaintiff, but gave the defendant leave to move to enter a nonsuit. On motion for that purpose—

Per Cur.—The safest way is, to construe words in their ordinary meaning, unless it is perfectly clear that they were used in some other sense. The words are here, that "if he or his executor shall become bankrupt the lease shall cease." Here the executor has become bankrupt. The very case provided for has literally occurred.

---

13. *To renew.*

SIMPSON *v.* CLAYTON, M. T. 1838. C. P. 4 *Bing. N. S.* 758; S. C. 6 *Scott*, 469.

THE Crown lessee of duchy lands had underlet on a building lease, with a covenant that he would apply for and do his utmost to procure a renewal, but his offer was only of a fine to the amount of two years' rack-rent, paid by the occupiers, the Crown requiring

A covenant to procure a renewal "to the utmost in the

* A. let a house to B., with a covenant that the lease should determine on B. committing any act of bankruptcy on which a commission of bankruptcy should issue, and by another deed of the same date A. grants the use of the furniture to B. in like manner, and with a similar covenant to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy: if B. become bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants; and if it be proved on the one side that several of the servants of B., and many of his customers, knew that the goods belonged to A., and, on the other side, several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit upon the faith of them, and that he acted as master of the house, &c., it will be for the jury to say, whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them. (*Hickinbotham v. Graves*, M. T. 1824, N. P., 2 C. & P. 492).

covenantor's power," compels him to pay a fine*.

as a fine a sum amounting to three years' annual value of the premises.

The Court held, that the covenant was to be construed to impose on the covenantor no more than to pay a reasonable fine, but that the fine so claimed by the Crown being found by the jury as reasonable, and that the covenantor having declined to renew on those terms, could not be said to have done his utmost endeavour to obtain a renewal within the meaning of the covenant.

---

14. *To pay Rent.*

HARTSHORNE *v.* WATSON, H. T. 1838. C. P. 6 *D. P. C.* 404; S. C. 4 *Bing. N. S.* 178.

An action of covenant lies for rent, although the lessor re-entered.

THIS was an action of covenant by the lessor against the assignee of a lease, the lessor had re-entered for breach of the covenant to pay rent, under a proviso, that if the rent be behind and unpaid for the space of fourteen days after any of the days of payment, or if the lessee, his executors, administrators, or assigns should neglect, or fail in, or be guilty of a breach or non-performance of any of the covenants, &c., on the part of the said lessee, his executors, administrators, and assigns, to be performed and kept, then and from thenceforth it should and might be lawful to and for the lessor, his executors, administrators, and assigns, into and upon any part of the said demised premises, in the name of the whole, to re-enter, and the same to have again, as if the indenture had never been made. On demurrer—

Per Cur.—This is an action for the non-performance of covenants; and if the landlord were not paid his rent for the last year, the consequence of assenting to the unreasonable construction which is contended for, would be, that the landlord would lose all his rent. Such would be the consequence if we were to hold that the plaintiff had no right when the lease was at an end. Our judgment should be for the plaintiff.

GASLIGHT AND COKE COMPANY *v.* TURNER, M. T. 1839. C. P. 5 *Bing. N. S.* 666; S. C. 7 *Scott*, 778; *affirmed on error*, 6 *Bing. N. S.* 324.

But, if the premises be let for a purpose contrary to the

IN covenant against the defendant for the rent of certain demised premises, a plea, alleging that the contract was entered into between the parties for the purpose of violating the stat. 25 Geo. 3, by making certain preparations of and extracts from oil of tar, &c.,

* Upon a covenant in a lease for three lives, upon the death of any or either of the life or lives, to renew upon "notice within one year next after the death of any or either of said person or persons, for whose life or lives such premises were then held," and neglect for five years after the death of the first life, but a proper notice and request on the dropping of a second life, and bill filed to declare plaintiff entitled to a perpetual renewal on the ground of ignorance and accident:—Held, that the requisition made on the expiration of the second life clearly did not confer a right to have the first renewed; but the Court retained the bill for twelve months, with liberty to bring an action at law; if none brought within that period, bill dismissed without costs. (*Maxwell* v. *Wind*, 1 M'Clel. & Y. 458).

within the limits prescribed, and in greater quantities than those allowed by the statute. Building Act, the rent cannot be recovered.

The Court held—first, the plea to be a good answer to the demand, and that the action could not be maintained; secondly, that it made no difference, as to the legal result, whether the contract was by parol or by deed under seal; and lastly, that when the contract was entered into for the attainment of an illegal object, no subsequent change of intention would have the effect of curing it of its vice, and rendering it valid.

ABERCROMBIE *v.* HICKMAN, T. T. 1838. Q. B. 3 *N. & P.* 676.

COVENANT on a lease, granted by one Charles Wilmot to Thomas Tasker, dated June 24, 1804, for forty-one years, at the yearly rent of 21*l.*, which contained the usual covenants for payment of rent, and for repairs. The declaration alleged, that Wilmot assigned to the plaintiffs, and that Tasker's interest came by assignment to Pocock, who appointed the defendant to be his executor; and breaches of covenant were assigned for non-payment of rent, and neglect to repair. Pleas.—First, that Pocock never was the assignee; second, that the defendant is not the assignee; third, that the premises did not vest in the defendant as executor. It appeared that Tasker, the lessee, took the benefit of the Insolvent Debtors' Act (1 Geo. 4, c. 119) in 1822; an assignment of all his effects was made in that year to the provisional assignee, who, on the 18th of November, 1822, executed an assignment to Pocock, he having, on the 15th of November, signified in writing to the Insolvent Debtors' Court his acceptance of the appointment of assignee. He did, however, execute the counterpart of the assignment. To prove that he interfered with the property, the plaintiffs called a person, named Hardy, who was the husband of one of the daughters of Mr. Wilmot, the lessor. He had died in 1815, having by his will bequeathed an annuity to his daughter, Mrs. Hardy, for her sole and separate use, and after her death to her children, which was charged upon this, among other property. It was objected, that he was incompetent, but his testimony was admitted. Pocock died in 1832. The defendant contended, that, inasmuch as Pocock did not execute the counterpart of the assignment from the provisional assignee, he never became, in law, the assignee; but, if the assignment to him was valid, yet it could not pass to his executor on his death. The executor of the assignee of an insolvent debtor, is liable for rent, under the 7 Geo. 4, if the assignee acted as tenant.

Patteson, J., directed the verdict to be entered for the plaintiffs, giving the defendant leave to move to enter a nonsuit on both points. On motion for that purpose—

Per Cur.—We felt some doubt, whether the action could be maintained against the executor, from a provision in the Insolvent Debtors' Act, which may be thought to import that the appointment of such assignee is a mere personal trust; we mean, the power vested in the Insolvent Commissioners to appoint a new assignee on the death of him formerly appointed; but, on full consideration, and on referring to *Bloxham* v. *Hubbard*, (1 East, 110); *Aldritt* v. *Kelteridge*, (2 Ter. Rep. 194); and *Ex parte Bainbridge*, (2 Ves. Rep. 302), decided under the Bankrupt Act, (5 Geo. 2, c. 30), we think the executor is liable, as representing the assignee, if the latter acted as tenant of the premises demised, as well as assented to the assignment.

15. *To Repair.*

BELCHER *v.* M'INTOSH, 1837. N. P. 2 *Mood. & Rob.* 186.

Habitable repair means safe and comfortable*.

IN covenant, it appeared, that the lessee covenanted to put the premises within a reasonable time in a state of habitable repair—

The Judge held the covenant to mean such a state, as well with respect to safety as the comfort of the class of persons by whom, and the purpose for which, they were to be occupied.

STANLEY *v.* TOWGOOD, H. T. 1837. C. P. 3 *Bing. N. S.* 4; S. C. 3 *Scott*, 313.

And a covenant to keep and leave a house in repair, means substantial repair; and the criterion would be, whether the house was new or old.

COVENANT against the defendants, the executors of a lessee, for a breach of the following covenant in a lease for fourteen years, of a messuage and premises:—"That said, &c. (the lessee) shall and will, during the continuance of this demise, preserve and keep, and at the end or other sooner determination of the said term of fourteen years hereby granted, leave the said demised messuage and other buildings, and all the out-houses, offices, windows, doors, drains, sewers, pipes, and other water-courses, gates, hedges, and fences, belonging to, in, or about the said demised premises, in good and tenantable order and repair; all losses and damages or tempest in the mean time excepted."

Per Cur.—When the case was submitted to the jury, it was a question for them, whether the premises were in good and tenantable order and repair when the action was brought. The question, it should be recollected, in all cases is, whether the premises are in substantial repair. It does not refer to or comprehend those fanciful, trifling, immaterial breaches which occasion no actual damage, such as, for example, the cracking of a pane of glass, but such as, consistently with good sense, twelve men should be called together to decide. The objection to the supposed direction is founded upon the words ascribed to the learned Judge in his summing up, viz. that the state of the premises at the time of the demise, whether they were new or old, was not matter for their consideration. Now, if that had been the direction of the Judge, the case, we think, ought properly to be submitted to another jury.

BURDETT *v.* WILLIAMS, T. T. 1837. K. B. 2 *N. & P.* 122. MANTZ *v.* GORING, M. T. 1838. C. P. 4 *Bing. N. S.* 451; S. C. 6 *Scott*, 277.

And the general state of the premises at the

THE declaration stated, that the defendant became tenant to the plaintiff of certain premises, and promised to keep them in good

* Under a covenant for a lessor to be entitled to "view", refusing to shew particular rooms is not a breach, unless convenient notice has been given. (*Doe* d. *Wetherell* v. *Bond*, 6 C. & P. 195). But, under the word "upheld, &c.", removing a wall, partly a garden, and taking up trees ten feet high, is a breach of covenant. (*Doe* d. *Wetherell* v. *Bond*, 6 C. & P. 195). Under a covenant, "substantially to repair, uphold," &c., held, that the lessee was liable to keep up the inside painting. (*Monk* v. *Noyes*, 1824, N. P., 1 C. & P. 265). Upon a covenant to repair premises, which, at the time of the demise, are old:—Held, that it was for the jury to say, whether the lessee has done what was reasonably to be expected, looking to the age of the premises and covenants entered into; and that he was not bound at the end of the term to restore the buildings in a renewed form, or of greater value, but only to take care that they did not suffer more than the operations of time and nature would effect. (*Gutteridge* v. *Munyard*, 2 M. & Rob. 334).

repair. Breach, that he did not keep them in repair. Plea, payment into Court of 5*l.*, and no damages ultrà. It appeared that the defendant had been the tenant of the plaintiff, of a cottage and some premises, and when he left them certain repairs were requisite, which, according to the estimate of a surveyor, would have cost upwards of 100*l.* The defendant proposed to give evidence of the state of the premises when he took possession of them; but *Alderson*, B., thought that that evidence was not admissible on the issue, and refused to receive it, and the plaintiff recovered a verdict.

commencement of the term may be questioned, and considered by the jury.

Per Cur.—The state of the premises when the defendant obtained possession was clearly material on this issue, and the evidence ought to have been received. Rule absolute.

DOE *v.* MEUX, T. T. 1825. K. B. 4 *B. & C.* 606; S. C. 7 *D. & R.* 98.

IN ejectment it appeared that the lessor of the plaintiff was landlord of the premises, on the day laid in the declaration, by virtue of a lease dated on the 1st of June, 1769, which contained the usual covenant, binding on the defendants, that they would keep the premises in repair; and a further covenant, that the landlord might enter into the premises to examine their state and condition, and of all defects and want of reparation then and there found, to give or leave notice in writing at the premises unto the tenants, to repair and mend the same within the time and space of three calendar months then next ensuing, within which said time or space of three calendar months next after every such view to be made, and notice thereof to be given or left as aforesaid, the tenants thereby covenanted well and sufficiently to repair and amend all such defects and want of reparation of which such notice had been given. The lease contained a proviso, that if the covenants were not kept and performed, it should be lawful for the landlord to re-enter, and the same to repossess and enjoy. The landlord left such a notice; but before the expiration of the three months he brought an action of ejectment.

If there be a general covenant to repair, and another to repair within three months, a notice under the latter is a waiver of the former.

The Court held, that giving the notice was a waiver of the forfeiture, and that an action of ejectment would not lie until the three months had expired.

DOE *d.* DALTON *v.* JONES, M. T. 1832. K. B. 1 *N. & M.* 6; S. C. 4 *B. & Ad.* 126.

THE lease contained a covenant to repair and keep in repair the premises, together with all such buildings, improvements, and additions whatsoever, as at any time during the said term should be erected, set up, and made thereon; general proviso for re-entry, in case the lessee should not perform all covenants. In the month of January 1832, the defendant made some alterations in this dwelling-house, and converted the front parlours into two shops, and threw out two wide shop-windows. For this purpose it was necessary to pull down part of the front of the house; one door inside a partition was removed, one door was stopped up, and a new one broken open.

Enlarging windows and opening external doors is not a breach of a covenant to repair.

Park, J.—Can it be contended, that the enlarging windows under a term for forty years is a breach of the covenant to repair? If enlarging windows is not, what has the defendant done in this case to make it such a breach?

Taunton, J.—The turning a dwelling-house into a shop, or making

a new door, is not a breach of the covenant to repair. That is intended to supply the wear and tear, and the clause of re-entry is to guard against default of reparation.

---

16. *Not to sue.*

LANCASTER *v.* HARRISON, T. T. 1830. C. P. 6 *Bing.* 726.

An undertaking not to sue until a certain event happens, which does not take place with the knowledge of the covenantor, does not preclude the covenantee from suing.

THE defendant drew certain bills of exchange as surety for C. H., the acceptor. By a deed, to which C. H., the defendant, the plaintiff, and one B. were parties, C. H. conveyed his lease, fixtures, and effects to B., upon trust, to sell the same, and pay to the plaintiff a debt due to him from C. H., and also the bills in question. The deed also contained a proviso that the premises should be sold, and the proceeds applied to the purposes specified in the deed, before any proceedings should be had on the bills against the defendant. The trustee, with the knowledge of the defendant, omitted to take possession under this deed; and in the mean time a commission of bankruptcy issued against C. H., under which his effects were sold by the assignees.

The Court held, that the proviso in the deed did not, under these circumstances, operate as a bar to the plaintiff's right to sue the defendant upon the bills.

---

17. *Not to carry on certain Trades.*

ARCHER *v.* MARCH, T. T. 1837. Q. B. 6 *A. & E.* 959; S. C. 2 *N. & P.* 562.

A covenant not to carry on trade to and from certain places is legal;

A COVENANT was entered into, by which certain persons, who were carriers from London to Cambridge, Norwich, and various parts of the county of Norfolk, agreed that neither they, nor their heirs nor executors, should carry on so much of their trade as extended from Swaffham, and places contiguous thereto, to London, and from London to Swaffham; the consideration for the agreement being the payment of one-third of the carriage of all fodder carried along the line of road—

The Court held the covenant legal, and that they could not enter into the reasonableness of the restraint in respect of the consideration, nor declare the covenant void by reason of the restriction being unlimited.

LEIGH *v.* HIND, T. T. 1829. K. B. 9 *B. & C.* 774.

and means the nearest mode of access.

THE vendor of a public-house covenanted with the purchaser not to carry on the business of a publican within the distance of half a mile. Upon a question whether this covenant had been broken, it appeared that if the distance were measured along the foot-path, with an occasional crossing of the carriage-way, so as to arrive at the point by the shortest possible mode, the distance was within half a mile.

The Court held, that for this purpose the mode of admeasurement which had been taken was correct, and that the covenant was broken. If the distance were to be measured by drawing a straight line, or, as it is popularly termed, as the crow flies, there might be a question, whether this would be a correct mode of admeasurement for such a purpose.

HORNER *v.* ASHFORD, M. T. 1825. C. P. 3 *Bing.* 322.

DECLARATION in covenant. The plaintiff declared that the defendant had engaged himself as the clerk, book-keeper, and traveller of the plaintiff, for a term that was not expired; and that, during such term, the defendant was not to be employed for any one else without the plaintiff's consent in writing; and that, by an indenture made between the plaintiff and the defendant, (one part of which the plaintiff brought into Court), the defendant, for the considerations therein mentioned, covenanted with the plaintiff that he would not enter into or pass through certain towns, to solicit or take orders, within a certain time therein mentioned; and assigned, for breach, that the defendant did enter into such towns and solicit and obtain orders in them within the time prohibited.

And a covenant not to seek for orders in certain towns, except at certain times, is not void as in restraint of trade.

The Court held that the declaration was sufficient, as it stated that the defendant covenanted for the considerations mentioned in the deed; and that the defendant should have craved oyer of that instrument, if he meant to object to the sufficiency of the consideration; for the agreement must be presumed to be legal.

DOE *d.* WETHERELL *v.* BOND, M. T. 1834. K. B. 4 *N. & M.* 285; S. C. 2 *A. & E.* 161; S. C. 6 *C. & P.* 195.

THIS was an action of ejectment, brought to recover premises on a clause of forfeiture, in case of the non-performance by the lessee of the covenants contained in the lease; and amongst others, for a breach of covenant, "that the lessee should not carry on the trade and business of a baker, butcher, slaughterer, (or other business therein specifically enumerated), or any offensive trade whatever." At the trial before Lord *Denman*, C. J., it appeared that the defendant, who was assignee of the lessee, used the premises in question as a private madhouse, and several witnesses were called, to prove the inconvenience and annoyance that such a house was to the neighbourhood, and his Lordship thinking that this was a breach of covenant, a verdict was found for the plaintiff. But—

So, keeping a lunatic asylum is not a trade or business within a covenant.

The Court held, that the keeping of a private madhouse was not the carrying on of an offensive trade, within the meaning of the latter part of the covenant, but that that must be taken to apply to trades ejusdem generis with those enumerated.

DOE *d.* CALVERT *v.* REID, E. T. 1830. K. B. *B. & C.* 849.

THE lessee of a public-house covenanted for himself, his executors and assigns, with his lessors, (brewers), to take all his beer of them or their successors in their said trade, and the lessors sold their trade and the public-house, with other premises, to third persons who removed the plant, &c. to a distance of two miles, and there carried on the business of brewers.

A covenant to take beer of the lessor, "or their successors in their said trade," is not binding, if the successor remove from those premises.

The Court held, first, that a covenant by a tenant with a brewer, (landlord), to purchase of him all the beer which should be sold on the premises, is not a covenant which would pass to the assignee of the lessor; secondly, but, even if such covenant should so pass, it cannot be enforced where the business of the original brewer (landlord) is not carried on at the same place by the assignee.

SIMONS *v.* FARREN, M. T. 1834. C. P. 1 *Bing. N. S.* 126.

A covenant not to carry on the trade of a common brewer or retailer without license applies to a sub-lessee.

IN covenant it appeared that the plaintiffs, who were assignees of a lease containing a covenant not to carry on or permit, or suffer to be carried on, a certain trade upon the demised premises without a license in writing of the lessor &c. granted a sub-lease to the defendant, subject to the covenants of the original lease, and gave him a license to follow a trade, (alleged by the original lessor to be the prohibited trade), subject to a proviso that such license should not exempt the defendant from payment of rent in consequence of the interference of the original lessor. The heir of the original lessor brought ejectment for a forfeiture by reason of the breach of this covenant, by carrying on the trade pursuant to the license, and the defendant suffered judgment by default. In an action of covenant by the plaintiffs for non-payment of rent, the defendant pleaded the leave and license by the plaintiffs to carry on the trade; that he entered the premises and was using and carrying on the trade, when by reason and on the ground that he so carried on the trade and the forfeiture of the lease thereby, "one R. C. having good right and title to the said demised premises as eldest son and heir at-law to M. A., (the original lessor), before any part of the rent became due, brought an action of ejectment and recovered judgment against the casual ejector, whereby before any rent became due the defendant was evicted."

The Court held, that this plea was bad, as it did not negative the leave and license of the superior landlord in writing, and did not shew any sufficient title in him to enter and evict the defendant.

HINDE *v.* GRAY, M. T. 1839. C. P. 1 *Scott, N. S.* 123.

But, a covenant for the exclusive privilege of supplying beer to certain houses, is not the subject of a demise.

UPON a demise by the defendant of a brewery at S. for a term, with covenant for the exclusive privilege of supplying beer to certain houses, (one kept by the defendant himself, and which he during the term assigned to G.); breach in an action upon the covenant that G. did not purchase beer of the plaintiff but from the defendant and others unknown.

The Court held the breach not well assigned, and thought such privilege could not be the subject of a demise:—Held also, that a covenant, that the defendant would not during the continuance of the demise carry on the trade of a brewer in S. or elsewhere, or in any way be concerned in such trade, was void as a general restraint of trade during the term.

LEADER *v.* PRYOR, 1837. N. P. 8 *C. & P.* 518.

And, a covenant to do the best to keep a public-house open, if the license be refused, is satisfied by an application for another license.

THE lessee of premises demised as a public-house, covenanted that he would use his best endeavours to keep it open as a licensed house; and it having been underlet to several tenants, at length, through the misconduct of one, the license was refused by the magistrates.

The judge held, that it lay on the defendant to shew, that after the withdrawal of it he did some act to obtain the renewal of the license, but that it was for the jury to say whether the plaintiff, in never having himself taken any steps to obtain the grant of the license, had sustained any substantial damage, and if not, that he was entitled only to nominal damages.

WALLIS *v.* DAY, H. T. 1837. Ex. 2 *M. & W.* 273.

A covenant, on the sale of a trade, to serve the plaintiff in such trade for £—, is not bad as in restraint of trade, though for life.

A TRADER covenanted to sell his trade of a carrier to the defendants, and not to trade as a carrier on his own account, but to serve them as an assistant in that trade during his life; and the defendants, in consideration of these covenants and of his faithful services, covenanted to pay him 2*l.* 3*s.* 10*d.* weekly, for fifteen years, and 1*l.* 8*s.* 10*d.* weekly if he survived that period.

Per Lord *Abinger*, C. B.—There is nothing unlawful in an engagement to serve another for life. On the contrary, my brother *Parke* has referred me to a case in Vin. Abr. (14), where it was held, that such contract must be by deed, which raises an implication that the Court thought such a contract might be good, though certainly it is not a direct authority. Then, it is said, that the covenant, not to carry on the trade as a carrier, but to serve the defendants for his life, was illegal. The reverse was decided in *Wickins* v. *Evans*, (3 Cr. & J. 318), where a contract by three persons to take a particular district each to himself, and not to interfere with the districts of the others, during his life was held to be binding, though the contract was for the term of the parties' lives. There is, therefore, no authority for saying that a contract to serve another for life, or to be restrained from carrying on business as a master for life, is illegal. The judgment of the Court in favour of the plaintiff may be sufficiently supported by the authorities cited in the judgment of the Court in *Mitchell* v. *Reynolds*, (1 P. Wms. 181). Here the party has sold his business to the defendants. He does not enter into a covenant not to trade again, but he contracts to continue in his trade as long as he is able to carry it on as their servant: when he comes to his old age and is no longer able to trade, he is to receive a smaller allowance. It cannot be said that this is a restraint of trade where the party covenants to carry it on as long as he is able; and it seems to us that there is a sufficient adequate consideration for the plaintiff ceasing to trade as a master, and covenanting to trade as the defendants' servant.

---

18. *To yield up at the end of the Term*.*

* A covenant by a lessee to yield up at the end of the term all erections and buildings then erected or thereafter to be erected, includes buildings subsequently erected for the purposes of trade, if they be let into the soil, but not if they rest on blocks or pattens. (*Naylor and Another* v. *Collinge*, M. T. 1807, C P., 1 Taunt. 19). Consequently, buildings erected for the purposes of trade, such as Dutch sheds, may be removed. (*Dean* v. *Allanley*, E. T. 1799, N. P., 3 Esp. 11). Where a lessee covenants that it shall be lawful for the lessor, if desirous of taking all or any part of the premises demised for building, to enter without interruption by the defendant, on giving six months' notice, and there is a proviso for avoiding the lease on non-performance of covenants, the refusal of the lessee to give up the premises after notice is a breach of his covenant and a consequent determination of his lease. (*Doe* d. *Wilson* v. *Abel*, H. T. 1814, K. B., 2 M. & S. 541).

IV. AS TO PAROL EVIDENCE EXPLAINING AND CUSTOMS CONTROLLING.

Clayton *v.* Gregson, T. T. 1836. 6 *N. & M.* 694.

A covenant as to a mine may be explained by parol evidence;

In an action of covenant on a lease of mines to work them not below the level of the bottom of the mine at a particular point—

The Court held, that evidence of the meaning of the covenant, according to the custom and understanding of miners, was admissible, and that it was for the jury to decide on its effect, and to say what was the contract between the parties.

Clayton *v.* Gregson, E. T. 1835. K. B. 4 *N. & M.* 602.

as the meaning of the word "level" in a lease of a coal-mine.

This was an action of covenant, and the question arose upon the following covenant in a mining lease:—"That the defendant would before the 30th of December, 1832, get the whole and every part of the demised mines, beds, and veins of coal, &c., not deeper than or below the level of the bottom of the mine, bed, or seam of coal, called the Arley mine, under a certain part or point, &c." The breach alleged was, that the defendant did not, before, &c., get the whole of the mines, &c., not deeper than or below the level, &c. The defendants' counsel proposed to call witnesses acquainted with mining to shew a peculiar meaning attached to the word "level," and that it did not mean the horizontal level. This evidence *Alderson*, B., rejected, and whether admissible or not was the question now before the Court; and it arose upon a motion to reduce the damages, or for a new trial, the parties having agreed, upon certain terms between themselves, as to the amount of damages.

The Court held, that parol evidence was admissible to shew what meaning miners, in the neighbourhood of the mine leased, attached to the word "level."

Smith *v.* Wilson, T. T. 1832. K. B. 3 *B. & Ad.* 728.

A custom may control a covenant.

This was an action of covenant by the out-going tenants against the landlord, upon a covenant by the former, that, at the expiration of the term, they would leave upon the warren (part of the premises demised) 10,000 rabbits or conies, the landlord paying 60*l.* per thousand for the same, and to pay for any more than that number at the same rate; the number to be estimated by two indifferent persons, one to be chosen by each party. The plaintiffs averred, that, at the expiration of the term, they left more than 10,000, to wit, 19,200 rabbits upon the warren; and that the number was estimated by two indifferent persons, following in the averment the terms of the lease. At the expiration of the term, the rabbits were viewed by persons appointed by the plaintiffs and defendant; and there were then in the warren 1,600 dozen rabbits; and such number was accordingly found by the referees. The defendant contended, that, by the custom of computation in the country, the 1,600 dozen should be computed at 100 dozen to the thousand; and, therefore, that he was liable to pay for but sixteen thousand. The plaintiffs, on the other hand, contended, that the expression

"per thousand" must be understood in the ordinary sense; and that the defendant ought to pay for 19,200, being 1,600 dozen. The defendant had paid into Court a sum sufficient to cover his liability in case his mode of computation was the correct one. This being the question, proof was offered on behalf of the defendant to shew that the term "thousand," when applied to rabbits in that part of the country, meant 100 dozen. The admissibility of the evidence was objected to, on the ground that the term had a legal fixed acceptation known to the law. The proof was, however, admitted, and its effect in the result was, that the defendant obtained a verdict.

The Court held, that evidence was admissible to shew that the custom of that part of the country, in counting rabbits, was to allow six score to the hundred.

V. AS TO THE PERFORMANCE OF COVENANTS, AND WHAT SHALL BE CONSIDERED AS A BREACH AND WAIVER OF, AND OF THE DISCHARGE FROM COVENANTS.

Tufnell *v.* Constable, Executors, etc., H. T. 1838. Q. B. 3 *N.* & P. 47.

A voluntary deed and covenant by a testator, that his executors should invest certain monies in the name of a corporation for charitable purposes, is not defeated by shewing no corporate powers exist for such purpose.

Covenant on an indenture made February 9th, 1832, between the testator and the vicar of the vicarage of Wormingford, (who was the plaintiff), whereby the said testator covenanted with the said vicar and his successors that the testator would, within three calendar months after the date of the said indenture, or that, out of his personal estate, his executors should, within six months after his decease, invest, at interest, in the 3*l.* per cent. consols, or in some other government or Parliamentary stock or fund of Great Britain, producing perpetual annuities, and in the corporate name of the vicar of the vicarage, of and in the corporate names of the churchwardens, of the parish of Wormingford, and in the corporate name of the archdeacon of Colchester, such a sum of money as, when invested, should produce the yearly dividend of 35*l.*, and that such sum of money and the said yearly dividends should be held, received, and applied by the vicar for the time being, the churchwardens for the time being, and the archdeacon for the time being, in trust to apply yearly 10*l.* towards the maintenance and support of the parish school of Wormingford, in payment of the salary of the schoolmaster and schoolmistress, and the purchase of books and other materials necessary for the school. The declaration averred, that the plaintiff continued to be vicar, and that neither the testator in his lifetime, nor the defendants since his decease, though often requested, have made the investment, but have wholly refused so to do. The defendants craved oyer of the indenture, which was set out and contained the covenant as declared upon and other trusts for the residue of the sum of 35*l.*, it being provided that the trustees should lay out 10*l.* a year in the purchase of coals, to be sold to poor people of the parish of Wormingford, and 5*l.* in the purchase of blankets, to be distributed among them, and once a

year they were to exhibit a statement of the accounts to the parishioners. The defendants then demurred—

Per Cur.—The defendants having refused to perform this covenant, the plaintiff brings the action. The defendants say they cannot perform it. Why not? There are persons in whose name the investment may be made. It is possible that the law may interfere with that investment when made. It is, nevertheless, the duty of the party to make the investment.

HOBSON *v.* MIDDLETON, H. T. 1827. K. B. 6 *B. & C.* 295.

A covenantor assenting to a breach he could not prevent, does not thereby commit a breach.

IN covenant, on a deed of bargain and sale of certain premises, that defendant would not knowingly or willingly permit or suffer any act, &c., whereby, &c. Breach first, that defendant had conveyed the premises to S.; secondly, that he had knowingly and willingly permitted certain acts, &c., to wit, that defendant did execute a certain indenture, and did suffer and permit H. to execute, whereby, &c.

The Court held, that assenting to an act which the covenantor could not prevent, was not a breach of this covenant set forth in the declaration, and that the defendant was not liable.

DOE *d.* AMBLER *v.* WOODBRIDGE, E. T. 1829. K. B. 9 *B. & E.* 376.

A continuance of a breach of covenant is not waived by receipt of rent.

THE lessor of the plaintiff was owner of the house in question. It was occupied by the defendant under a lease, containing a covenant, that the tenant should not alter, convert or use the rooms thereof, then used as bed-rooms, or either of them, into or for any other purpose than bed or sitting rooms, for the occupation of himself, his executors, &c., or his or their family, without the license of the lessor in writing; the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied, up to the time of the trial, the rooms specified in the covenant above set out; but the lessor, who lived next door, after he knew of such occupation, had received rent under the lease. Upon these facts the question was, whether, by thus accepting the rent, he had waived the forfeiture? The Lord Chief Justice thought there was a continuing breach, as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff, but reserved leave to the defendant to move to enter a nonsuit.

Per Cur.—Upon the particular language of this covenant, we are of opinion that the verdict was right. It is not denied that a forfeiture was occasioned by the use of the rooms contrary to the terms of the lease; nor is it to be assumed that this was no inconvenience to the landlord, who lived next door. The demise in the declaration was dated the 22nd of October, and the rent was not received until November. But, upon the ground alone that there was a continuing breach, we think the verdict should not be disturbed.

DOE *d.* NASH *v.* BIRCH, E. T. 1835. Ex. 1 *M. & W.* 402.

And the demand of rent to

UPON an agreement for the demise of premises, that the tenant should, within three months, &c., erect a shop-front and otherwise

repair, &c., with a power of re-entry for breach of the agreement, the defendant entered and enlarged the window, but did not erect a shop-front; the son of the lessor, after the three months, had demanded a quarter's rent then due.

waive a forfeiture must be made by a person authorized to waive the forfeiture.

The Court held, that the son having no authority to waive the forfeiture, the demand of rent by him was not such a notice to the lessor as could make the demand amount to a waiver; and that the defendant could not give in evidence a clause in the original lease, justifying the carrying on any trade upon the premises, to explain and qualify the term shop-front in the agreement.

HARLEY *v.* KING, E. T. 1835. Ex. 1 *C. M. & R.* 18.

An assignee by assigning does not discharge himself from breach of covenants running with the land, incurred in his time.

COVENANT. The declaration alleged that one Pearce, on the 27th of May, 1822, demised certain premises to one Bedel for twenty-one years, and Bedel covenanted for himself, his executors and assigns, to keep the same in repair. Pearce afterwards devised the premises to his wife for life, remainder to plaintiff for life, and died. His widow entered and also died, whereupon the plaintiffs became seised. It then alleged, that all the estate and interest of Bedel came to the defendant by assignment, and set forth a breach of the covenant to repair after the assignment to him, and after the plaintiffs became seised. Plea.—That after the defendant became the assignee, and before the commencement of the suit, he assigned his interest to one N. P. Replication. That the breach was committed while the defendant was assignee, and before he assigned over. Demurrer and joinder in demurrer.

Per Cur.—The covenant to repair is a covenant which runs with the land, and therefore the assignee is bound by it. If the covenant is broken, and he becomes liable to an action, you must shew that that right of action is gone; but upon the breach of the covenant, the right of action is immediately vested in the lessor though the damages may be only nominal. Being bound by the covenant in respect of the land, when a breach of it occurs which vests a right of action, no assignment can divest or alter that right, so far as regards the maintenance of the action. You may suppose some cases of special omissions, where the damage may be irreparable, and it would be unjust to make a subsequent assignee responsible for it. Again, a man who has been in possession of a lease for twenty years, may assign it over for the last month of the term; it would be very mischievous to hold that he should not be liable. But the law vested a right of action while the defendant was in possession, and nothing occurred to divest it afterwards.

VI. REMEDIES FOR BREACH OF COVENANT.

(*a*) ACTIONS, WHEN AND BY WHOM MAINTAINABLE.

IRELAND *v.* BONHAM, T. T. 1835. C. P. 2 *Bing. N. S.* 90.

Where an under-lessee's term is not to commence until a distant day,

THE defendant, assignee and mortgagee of certain premises, in June, 1826, at the request and with the permission of the mortgagor, demised and leased to the plaintiff, for the term of nine years, as and from the 25th December, 1836, being the expiration of the

he can maintain no action of covenant until that day has arrived*.

term granted by the existing lease, at a certain yearly rent. The indenture contained a covenant for quiet enjoyment by the plaintiff, his executors, administrators, and assigns, paying the rent, and observing, performing, and keeping the covenants, and for their lawfully (during the term demised), peaceably, and quietly holding, &c., without any let, suit, or disturbance, from or by the defendant, or his executors, administrators, or assigns, or any person claiming by, from, or under, &c.. Upon forfeiture of the lease by the defendant, for non-payment of rent—

The Court held, that the plaintiff could not maintain an action for the breach of the covenant for quiet enjoyment during the term commencing in the year 1836; it being the intention of the parties that the covenant was not to operate until the time for entering into possession.

WHITTON *v.* PEACOCK, H. T. 1836. C. P. 2 *Bing. N. S.* 411; S. C. 2 *Scott*, 630.

And where covenants in a lease are embodied in a subsequent lease, the latter must be sued on, not the former.

THE following case was sent by the Master of the Rolls for the opinion of the Court:—B., seised of certain copyhold premises, devised to G., without surrendering to the use of her will. Under a subsequent surrender by G., and the customary heir, to the use of M., and a devise by M., L. was admitted tenant, and in August, 1762, made two leases to K. (containing many covenants) of the premises in question. Ten years afterwards, in consequence of the finding of the homage that B., the first devisor, did not surrender to the use of her will, L., the lessor and devisee, acquired the legal estate, and made a new lease of the premises to K. This lease recited those of August, 1762, (which were not cancelled, being in the hands of mortgagees), and contained the same covenants, conditions, &c.

The Court held, that the plaintiff, in whom the estate of L. had vested, could not maintain an action against the assignee of the lessee for a breach of the covenants contained in the leases of August, 1762; but he should have sued on the new lease.

SERVANTE *v.* JAMES, M. T. 1829. K. B. 10 *B. & C.* 410.

If a covenant be several, each must sue alone; a joint action will not lie;

IN an action of covenant, it appeared that the captain of a post-office packet covenanted with the owners thereof, and their several and respective executors, administrators, and assigns, to pay to such owners, and their and every of their several and respective executors,

* So where the plaintiff acting as an agent in the sale of stock and goodwill, the defendant engaged to pay him a liberal sum on the premium, upon the business being completed, prior to which the plaintiff became bankrupt:—Held, that, as the bankrupt, upon the completion of the sale, would have been entitled to the compensation for the work done prior to his bankruptcy, it was part of his estate, and that his assignees only were entitled to sue, when the period of payment arrived; and that they could not by disclaimer give him a right to maintain the action. (*Petrie* v. *Bury*, 3 B. & C. 533; S. C. 5 D. & R. 152). Where, in covenant, the declaration described the deed to be made by the plaintiff of the first part, by J. C. of the second part, and by C. of the third part; it appeared in evidence to be executed by G. C., and in the deed to be uncertain, whether it was the deed of J. C. or G. C.:—Held, that the variance was fatal. (*Mayelston* v. *Lord Palmerston*, M. T. 1825, N. P., 2 C. & P. 474, and 1 M. & Malk. 18).

administrators, and assigns, the sum received from government for the hire of the ship, and a proportion of the freight, to be paid to them at the banking house of Messrs. B. & Co., or such other bankers as the captain and the said owners should appoint, and in such shares and proportions as were set against their several names; and further covenanted to pay to the said owners, their executors, &c., the appraised value of the tackle and apparel of the ship, &c., in their shares and proportions aforesaid.

Per Cur.—The first covenant is, to pay to the owners, their several and respective executors, administrators, or assigns, the sums allowed for the hire of the ship; and unless we strike out the words "several and respective executors," we cannot make this a joint covenant. Then, it is to pay in such shares and proportions as were set against the several names of the owners; which, we think, constituted a separate covenant with each as to his proportion. The payment into one bank might be for the convenience of the covenantor, in order that he might not be required to seek out the parties entitled to the money; this, however, as it appears to us, does not bind him to pay it in in one sum; but he might, we think, pay in a portion only specifically, to the use of one party; in which case the remedy as to the residue would be a remedy to be enforced, not by the party who had been paid, but by those who had not. Each sustains a separate injury by the non-payment of his share; and if it were otherwise, then, in case of the death of any one owner, it would follow that his remedy would survive to the others, though the damage might be exclusively to his representatives, all the surviving owners having been paid. Or suppose all the parties died, are the representatives of the last survivor to sue? Such a construction is at variance with the early language of the instrument, to pay to the representatives of each. So, also, if the owners are to sue jointly, a release by one would destroy the remedy of all. That is inconsistent with reason, and with the intention of the parties; and we therefore think that the interest here was separate, and, consequently, that the action ought to have been separate also.

LANE *v.* DRINKWATER, M. T. 1834. Ex. 1 *C. M. & R.* 599; S. C. 3 *D. P. C.* 223; S. C. 5 *Tyrw.* 40.

but if joint, they must sue collectively.

DECLARATION in covenant, that A. and B., in consideration of 800*l.* paid to them by C. and D., severally and respectively granted, covenanted, and agreed to and with C. and D., their heirs, &c., to pay to the said C. and D., their executors, &c., one annuity, or yearly sum of 30*l.*, in the shares and proportions following; viz. the sum of 15*l.*, being one moiety of the said annuity, or yearly sum, unto C., and the sum of 15*l.*, the remaining moiety thereof, to D.; the said moieties to be respectively paid quarterly. The deed contained several provisions for securing the annuity, which were all given to C. and D. jointly, and a joint warrant of attorney, to enter up a joint judgment; a reversion of a close of land was granted to them jointly, and a joint power of attorney was given to them to sell stock; lastly, the annuity was made redeemable, by the payment to both of one entire sum.

Per Cur.—The rule is clearly established, that though a man covenants with two or more persons, using words which primâ facie import a joint covenant, yet if the interest and cause of action

of each of the covenantees appear on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage. *Eccleston* v. *Clipsham.* The question is, whether the interest in the money covenanted to be paid in this case is in the plaintiff and D., or an interest in a moiety in the plaintiff only; if in both, the covenant is joint, and the action cannot be brought by the plaintiff alone. Upon referring to the deed set out on oyer, it appears to us that it is a grant of and a covenant to pay one entire annuity of 30*l.* per annum to the plaintiff and D., one moiety of which is to be received by each, and not a grant of or covenant to pay two several annuities of 15*l.* to the plaintiff and D. respectively. Throughout the deed it is called one annuity; it is granted in consideration of a sum paid by both; it is secured by a warrant of attorney to confess a joint judgment, at the suit of both, by a grant to both of the reversion of a close and of a sum of money in the funds, with a joint power of attorney to recover it; and on seven days' notice to both, both covenant to receive one entire sum in full for the annuity, and, on receipt thereof and of the arrears, to deliver up the deed to be cancelled. We therefore think that it is but *one* annuity, and the covenant with C. and D. to pay it in moieties, a joint covenant. We do not mean to say, that if the deed had contained two distinct grants of two several annuities to the plaintiff and D., the circumstance of these annuities being collaterally secured by joint grants and authorities, or even redeemable by one joint payment, would have made the covenant with both to pay these annuities a joint covenant: but when we find express words describing it as one annuity, coupled with these provisions, we cannot doubt as to the effect of the deed. We, therefore, think that the interest in this case is in effect a joint interest in one entire annuity, and consequently the words of the covenant with the plaintiff and D. must be taken in their ordinary sense, and constitute a joint covenant on which the plaintiff alone cannot sue, and the judgment must therefore be arrested.

REDFORD *v.* BRITTEN, H. T. 1835. C. P. 1 *Bing. N. S.* 399; S. C. 1 *Scott*, 245.

If parties bind themselves by counter-deeds, either may maintain covenant on his deed, if independent of each other.

COVENANT. The plaintiffs, as assignees of the bankrupt, declared upon an indenture of the 25th of July, 1827, made between Austin the bankrupt of the one part, and the defendants and H. Parry deceased of the other; and which, after reciting, that the defendants and Parry on behalf of themselves and the other members of a society, called the British Building Society, had agreed with Austin to take on lease a parcel of ground described in the indenture, to build forty houses according to certain stipulations; that Austin covenanted with the defendants H. and Parry, that, when the houses should be built to the approbation of Austin, he would, at the request of the other parties to the indenture, grant a lease of the land and erections to such persons as they or the major part of the members of the society for the time being should require, at certain rents therein specified; that in consideration of the premises the defendants and Parry covenanted with Austin to pay him the rents until the leases should be granted; that by virtue of the indenture defendants and Parry entered into the premises, but, before the

leases were granted or ought to have been granted they failed to pay the rents. The defendants, after setting out the deed, pleaded, that, by another deed of the same date with the former, and made between the defendants and Parry of the one part, and Austin and the several other persons whose names and seals were thereto subscribed and set of the other part, and also, by certain other articles of agreement set out in the plea, Austin and the several other persons mentioned in that deed had formed themselves into a society called the British Building Society, for the purposes of erecting a number of houses, not exceeding forty, to be paid for out of a fund to be raised by monthly subscriptions; that Austin had agreed to demise the land on which the houses were to be built at certain stipulated times; that the agreement for the leases should be made and executed by the trustees of the society, in trust for the benefit of the members thereof until the completion of the same; that the deed contained a covenant on the part of all the members of the society, that, for the better indemnifying of the trustees, each of the members would, when called upon at their general meetings (to be held quarterly), do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts. The plea then alleged the identity of the society in the indentures mentioned, and the society in the articles mentioned; that Austin was all the time a member thereof; and that the defendants and Parry entered into and made the covenants in the declaration mentioned by and on behalf of themselves, and Austin and others, the members thereof as aforesaid, and for their use and benefit, and at their request and not otherwise. On demurrer—

The Court held, that the covenant to pay the rent being express, the obligations thrown on the plaintiffs by the latter deed did not prevent their maintaining an action on the former deed.

RAYMOND *v.* FILCH, M. T. 1835. Ex. 2 *C., M. & R.* 588.

An executor may maintain covenant for a breach committed in his testator's lifetime by cutting timber, &c.

COVENANT by the plaintiffs, as executors of Thomas Walford, on a lease granted by Walford to the defendant on the 5th of December, 1832, for a tenancy from year to year, in which the defendant covenanted not to fell, stub up, head top, or lop any of the timber trees, or trees likely to become timber, growing or being on the demised premises, or cut or take away wood or bushes, lops or tops, except such as had been agreed to be allowed for firewood; and, upon lopping the pollard trees, and cutting down the sub-wood and bushes, growing in or about any of the hedges and ditches of the demised premises, should, at the same time, new make and scour the same ditches, and lay one stratum of all the earth of the said ditches on the banks thereof, to nourish the quickset there. The declaration contained two breaches:—The first charged the defendant with having felled, &c., trees of a great value, and taken them away; the second with not scouring the ditches; and both were laid during the lifetime of the testator. The defendant craved oyer of the lease, and set it out. It was a common husbandry lease of a farm in Essex, containing an exception of the timber trees out of the demise, and also the above-stated covenants. The defendant then demurred to so much of the first breach as complained of the

felling of the trees, and as to the carrying of them away pleaded an accord and satisfaction, and demurred to the last breach.

The Court held, that, on A.'s decease, his executors might sue for breaches of this covenant committed in his lifetime.

SHORT *v.* KALLOWAY, M. T. 1840. Q. B. 11 *Ad. & E.* 28.

So, the assignee of a lease may sue the assignor for damages occasioned by his non-performance of covenants which, in the assignment, he had stated he had performed.

IN covenant, the declaration recited, that premises had been leased by P. to the defendant, with covenants to repair; that defendant had assigned to the plaintiff, with a covenant that the lease was valid and subsisting, and that he had performed all the covenants: breach, that the defendant had not performed the covenants, whereby the lease had become voidable, and that he had been forced to pay to C., his own assignee, a sum for compromising an action brought by C. against him, and an additional sum of 119*l.* for his costs, paid by him in defence to the action: plea of payment into Court of 5*l.*, and no damages ultra: replication, damages ultra, and verdict 45*l.* beyond the 5*l.* A motion for a new trial on the part of defendant, and one for the plaintiff to increase the damages, by adding the 119*l.* paid for costs, were both refused.

ROSE *v.* POULTON, H. T. 1831. K. B. 2 *B. & Ad.* 822.

A covenantor being also a joint and several covenantee is no objection, especially if he be dead at the time of action brought.

IN covenant by W. R. and E. W. jointly, on an indenture between C. S., of the first part; J. P. and C. P. and J. G., all since deceased, of the second; W. R. and wife, E. W., and the said J. G., of the third part. On a covenant by the parties of the second part, jointly and severally to the parties of the third part, for payment of an annuity to the wife of W. R.: pleas—first, that W. R. and E. W. never executed the deed; and secondly, that J. G. did. On demurrer—

The Court held—first, that, considering the covenant as joint, no objection arose from J. G. having been a party to it, though he was also a covenantor, his death removing any difficulty as to contribution, and leaving no incongruity in point of form; secondly, the deed expressing that the covenants by the parties of the second part were, in consideration of the "covenants thereinafter entered into:"—Held also, that it could not be considered an entire failure of consideration, that all the covenanting parties had not executed the deed, the covenants not being mutual or dependent.

(*b*) OF THE DECLARATION.

1. *As to the Venue.*

MAYOR OF BERWICK *v.* SHANKS, E. T. 1826. C. P. 3 *Bing.* 459.

A breach of covenant (in a local action) arising in Berwick-on-Tweed cannot be laid in Northumberland.

IN an action of covenant against the assignee of the lessee for not repairing, the premises were stated, in the declaration, to be situate within the liberties of Berwick-upon-Tweed, and the same was laid in the county of Northumberland.

Per Best, C. J.—It has been objected, that this is a local action; it is undoubtedly so, because it arises from a privity of estate, and not on privity of contract. Then, the question is, does it appear on the face of the declaration that it is brought in the wrong county? I confess I had for some time a doubt whether it did or not; but,

on looking into the case of *The King* v. *Cowle*, and the act of Parliament 1 & 2 Jac. 1, c. 28, I think it does so appear. Berwick was originally part of Scotland, and afterwards brought within this kingdom, and when Lord Mansfield gave his opinion in *The King* v. *Cowle*, he probably only saw the printed statute of Jac. 1 under which the corporation of Berwick now claim all their privileges, as set out in the general printed statutes; but by that act as set out in the statutes of the realm, although it appears that it was once part of Scotland, yet it is not now necessary to state it so in acts of Parliament, as it was thereby made part of England; but though brought within the kingdom of England, yet it is certainly not within the county of Northumberland. The charter of the corporation of Berwick being confirmed by act of Parliament, we are bound to take judicial notice of it. They have Courts within their own borough, and have the return of all writs out of the Courts at Westminster, and the sheriff of Northumberland has no jurisdiction within the borough.

BOYES *v.* HEWETSON, M. T. 1835. C. P. 2 *Bing. N. S.* 575; S. C. 2 *Scott*, 281.

In general, if the venue be laid in a wrong county, it is aided by verdict*.

IN covenant, by assignee of lessee against lessor, in respect of lands situate in Surrey, the action being brought in Middlesex, but the locality not appearing on the declaration—

The Court held, that there being no issue on the locality, it was no ground of nonsuit, and the objection was aided by verdict under 16 & 17 Car. 2, c. 8.

MAUDE *v.* SESSIONS, T. T. 1834. Ex. 1 *C., M. & R.* 86; S. C. 2 *D. P. C.* 699.—S. P. WEATHERLY *v.* GREIG, M. T. 1824, K. B., 3 *B. & C.* 552; S. C. 5 *D. & R.* 441.

The venue can not be changed before issue joined†;

ON motion to change the venue from Middlesex to Essex, in an action of covenant upon various covenants in a farming lease, upon which several breaches were assigned—

Per Cur.—There is no inconvenience occasioned by adhering to the general rule which is laid down in all the books of practice. Before issue joined, the nature of the question, and the number and description of the witnesses required, cannot possibly be ascertained. For any thing that appears, the defendant may plead a release; and that is not a question more fit to be tried in Essex than elsewhere. The defendant cannot suffer by our refusing the application; for after issue joined he may apply to a Judge at chambers.

CROMPTON *v.* STEWART, E. T. 1832. Ex. 1 *D. P. C.* 567; S. C. 2 *C. & J.* 473.

and the usual affidavit is not sufficient to change the venue‡.

APPLICATION to change the venue from London to Lancaster, in an action of covenant on a mortgage deed, upon the ground that the witnesses for both parties were resident in the latter county.

Bayley, B.—In such a case as this the venue cannot be changed

* And in the same case (7 C. & P. 127), at Nisi Prius, it was decided that, where the objection does not appear upon the record, the Judge at Nisi Prius in another county could not refuse to receive the evidence, nor nonsuit the plaintiff.

† The Court having changed the venue in an action of covenant for payment of rent, refused to bring it back. (*Arden* v. *Mornington*, 4 Tyrw., Ex., 56).

‡ In debt, on a covenant in a mortgage deed, with a count for goods sold in

upon the usual affidavit. In order to support a special application for the sake of saving expense of bringing witnesses from a distance, the defendant should shew by affidavit that he must necessarily call witnesses for his defence.

---

2. As to the Form of the Declaration, and of Variances.

WARD *v.* TRIMMER, M. T. 1832. K. B. 2 *A. & E.* 619.

The declaration must correspond with the writ as to the form of action.

ON motion to set aside the declaration, it appeared that the writ was in an action upon promises, and the declaration in covenant.

The Court set aside the declaration.

WILSON *v.* WOOLFRYES, E. T. 1817. K. B. 6 *M. & S.* 341.

A statement in the declaration, "that A., B., and C. demised by indenture," will be construed to mean a sealing and delivery by them.

IN a declaration in covenant, the allegation was that four "demised by indenture."

The Court held, that it imported a sealing and delivery by the four; and that, upon the issue "non est factum," after proof by the plaintiff of the execution of the counterpart by the defendant, the latter might produce the lease, and shew that it was executed by two only; and that it was a fatal variance between the proof and the declaration.

SAWARD *v.* ANSLEY, H. T. 1824. C. P. 2 *Bing.* 519.

A declaration on a covenant by a purchaser, to pay annuities and indemnify the plaintiff—breach for non-payment of the annuities is sufficient, without averring plaintiff had been damnified.

THE plaintiff by deed contracted to sell and convey to the defendant certain estates left him under the will of his father, chargeable with the payment of four several annuities to his sisters. The defendant covenanted to pay such annuities as the same were by the will directed to be paid, and that he would at all times thereafter save and indemify the plaintiff from and against all actions, suits, and demands on account of the same annuities, or in any wise relating thereto.

The Court held, that the defendant was liable to the payment of such annuities; although it was objected that the covenant for the payment of them, and indemnifying the plaintiff, was one entire covenant, and to be continued as a covenant to indemnify, by paying such annuities only as the plaintiff himself would have been bound to have done, and that he was not personally liable to pay them.

HENNIKER *v.* TURNER, E. T. 1825. K. B. 4 *B. & C.* 157.

So, a declaration by one of five tenants in common—breach, "that on &c., one-fifth part of the rent for &c., then elapsed,

IN an action of covenant, a tenant in common, seised of one-fifth part of certain demised premises, assigned for breach, that on the 24th of June, 1824, at &c., a large sum of money, to wit 21*l.* 15*s.*, being one-fifth part of the whole rent for three quarters of a year of the term then elapsed, became due, and was still in arrear. Special demurrer, assigning for causes—first, that the plaintiff had alleged in the breach that a certain specific sum of money, viz. 21*l.* 15*s.*, was due to him for his share of the rent, when he should not have alleged

L., the county into which it was sought to remove the venue, motion refused, there being no affidavit of merits, or that it would be necessary to call witnesses resident in that county. (*Anon.*, 2 Tyrw. 501).

that a specific sum was due to him for and on account of his share of the rent, but should have declared for one undivided fifth part of the amount of the three quarters' rent stated to be due; secondly, that it was averred that the sum claimed as one-fifth part of the rent for three quarters of a year of the term then elapsed became due; that this averment did not set forth with sufficient certainty for which three quarters of a year of the term the said sum was claimed to be due.

became due to the plaintiff," is sufficient.

Per Cur.—We are of opinion, first, that the allegation of the specific sum due is equivalent to an assignment of a breach for non-payment of one-fifth part of the whole rent, being 21*l.* 15*s.*; and secondly, that the three quarters of a year, for which the sum was claimed to be due, were set forth with sufficient certainty.

MILNER *v.* HORTON, M. T. 1824. Ex. 1 *M'Clel. & Y.* 647.

IN covenant, that the premises should be saved and indemnified from all charges; and the breach assigned shewed an eviction under a distress, by a person whose title to a rent-charge was inconsistent with the original reservation. On special demurrer—

So, a general averment in a declaration for eviction, that the "evictor was lawfully and rightfully entitled," is sufficient.

The Court held it bad. A general statement, that the evictor was "lawfully and rightfully entitled," would have been sufficient.

BROOKES *v.* HUMPHREYS, M. T. 1838. C. P. 7 *D. P. C.* 118; S. C. 5 *Bing. N. S.* 55; S. C. 6 *Scott*, 756.

IN covenant, the declaration alleged, that, by an indenture of lease, made the 24th of August, 1829, between the defendant of the one part, and one B. Webb of the other part, the defendant demised to B. Webb, his executors, administrators, and assigns, a certain messuage, tenement, and premises, with the appurtenances thereunto belonging, situate in the county of Essex, to hold the said messuage and premises unto the said B. Webb, his executors, administrators, and assigns, from Michaelmas day then next for the term of ten years and hence next ensuing at a rent of 50*l.* a year: that the defendant covenanted that he then had in himself good right to demise the said messuage &c., and moreover that Webb, his executors, administrators, and assigns, paying the said yearly rent of 50*l.* in manner therein in that behalf reserved, and observing and performing all and singular the covenants, &c., which, on the part of Webb, his executors, administrators, and assigns, were to be observed and performed, should peaceably and quietly have and enjoy the premises thereby demised for and during the term thereby granted without lawful let or disturbance of, from, or by the defendant, his executors, administrators, or assigns, or of, from, or by any person or persons whomsoever: that Webb entered and assigned to the plaintiff during the term; but that the defendant, at the time of making the lease by him to Webb, had not in himself good right to demise the said messuage or tenement and premises in manner thereinbefore in that behalf mentioned, being, at the time of making the lease to Webb, seised of, and entitled to, and interested in the said messuage or tenement and premises, with the appurtenances, for and during the life only of one S. Clapham, which said S. Clapham, after the assignment to the plaintiff, and during the continuance and long before the expiration of the residue of the said term of

But upon an eviction, the declaration must shew that the party did not come in under the plaintiff.

years, to wit, on the 25th of February, 1837, departed this life, whereupon all the title, interest, and claim whatsoever of the defendant, and of all and of every person and persons claiming or to claim by, under, or through him, in or to the said demised premises, or to the possession thereof, and of the plaintiff, under or by virtue of the said assignment to him as aforesaid, utterly ceased and determined, and during the continuance and long before the expiration of the residue of the said term of years therein mentioned, and after the death of the said S. Clapham, to wit, on &c., one Eliz. Noon, then lawfully claiming in that behalf, and from and upon the death of S. Clapham, and then, having full, just, and good title to the said messuage or tenement and premises, and to the possession thereof, as against the defendant and all and every person and persons claiming by, under, or from him, and as against the plaintiff claiming under the assignment hereinbefore mentioned to have been made to him, entered into and upon the premises with the appurtenances, and therefrom and from the possession thereof under the said assignment, and from the said residue then to come of the said term of ten years, did rightfully and wholly put out, eject, and remove the plaintiff, to the damage, &c. On demurrer to the plea—

Per Cur.—The plaintiff had better amend the allegation of the good title of the party by whom the plaintiff was evicted; it should not be general and unqualified; it should be, "that the person evicting had a lawful title before or at the time of the grant to the plaintiff;" for if the allegation be general and unqualified, it will be intended that the title of the party entering is derived from the plaintiff himself.

LEDGBIRD *v.* JUDD, M. T. 1825. K. B. 7 *D. & R.* 517.

And a declaration by the heir, stating that he was "cousin and heir" is insufficient—it must shew how.

IN covenant, plaintiff declared that one H. L. (deceased), being seised in fee, demised certain premises to the defendant, and that, upon the death of the said H. L., the reversion in the said premises descended and came to the plaintiff as cousin and heir-at-law of the said H. L. The defendant demurred, and assigned for cause, that the plaintiff had not stated how he was cousin to the said H. L., or in what manner in particular he was related to the said H. L., or what degree of consanguinity existed between them.

The Court were clearly of opinion, that the declaration was insufficient. In the case of *Scavage* v. *Hawkins*, (W. Jones, 453), most relied upon, the defendant had acknowledged the father, and the plaintiff came in under him as his son. The title here ought to have been fully set out, so that the defendant might know what claim he had to meet.

HAMS *v.* BEAVAN, E. T. 1828. C. P. 4 *Bing.* 616.

But it is cured by verdict.

IN covenant by a devisee against the assignee on a lease by the testator, the declaration alleged generally, that the testator was seised, but did not say of what estate. On motion in arrest of judgment—

Per Cur.—In *Willet* v. *Boscombe*, (11 Mod. 179), the authority referred to by Viner, an heir brought an action of covenant against an assignee for rent, but did not set forth in his declaration that his ancestor was seised of any estate when he made the demise,

but only generally "quod cum dimisit," &c.; and it was urged, in arrest of judgment, that the declaration was ill, the plaintiff not shewing a title in his ancestor. The case of *Scavage* v. *Hawkins*, (Cro. Car. 571), where, in debt on a lease for years, the plaintiff declared that his father was seised in tail, but did not shew when the estate began, being there referred to, Lord Holt said:—"The case of *Scavage* v. *Hawkins* is well on issue joined, because it shews the father was seised, and so it would have been well on demurrer;" and the defendant had judgment; but here, although the plaintiff's title is very imperfectly set out, yet enough appears on the face of the record to support the verdict.

PITT *v.* WILLIAMS, T. T. 1834. K. B. 4 *N. & M.* 412.

And a declaration for breach of covenant, whereby an annuity became impeached:—Held, that the declaration must state the acts by which the annuity became impeached.

UPON a grant of an annuity by A. and B., charged upon the profits of coal-mines of which they were lessees, A. also being lessee in trust for himself and B. of lands adjoining and necessary to the working the mines, they covenanted to do an act whereby the annuity might be impeached, and A. afterwards surrendered the land, and took a fresh lease to himself and B. jointly in trust for other parties. In covenant, alleging as breaches—first, that the annuity became by such surrender and new lease impeached; and secondly, the taking the new lease at an increased rent, and upon more disadvantageous terms, for the purpose of obtaining a demise of mines under the land upon terms advantageous to A. and B., whereby the annuity became impeached; and thirdly, the assigning the adjoining land and mine thereunder to a third party, whereby, &c.—

The Court held the declaration insufficient, as not shewing how the acts alleged operated to impeach the annuity, but that the declaration need not allege that any profits accrued from the mine whereon it was charged; aliter, if action were to recover arrears.

SICKLEMORE *v.* THISSLETON, E. T. 1816. K. B. 6 *M. & S.* 9.

So, where a surety covenants to pay rent if in arrear three quarters, forty days after demand, the declaration must aver a demand, and that the forty days have expired.

ON a lease to J. T., with covenants to pay the rent on stated days, with interest in case it should be behind for three quarters, and in which defendant also covenanted that J. T. should pay the rent and interest, and duly observe all the covenants, and that "in case J. T. should neglect to pay the rent for forty days, that defendant should pay on demand;" in an action against defendant assigning non-payment of rent, and other breaches generally—

The Court held, that the latter clause, as it regarded the surety, was a qualification of the former, and did not render him liable until after forty days and demand made; and the verdict being for damages generally upon the whole declaration, although some of the breaches were well assigned, the judgment was arrested.

VYSE *v.* WAKEFIELD, T. T. 1840. Ex. 8 *D. P. C.* 377; S. C. 6 *M. & W.* 442.

Under a covenant to appear

COVENANT, that the defendant would appear at any insurance office within the bills of mortality, and answer certain questions to enable

in order to insure, and not do any act to avoid the policy; breach, that the defendant went abroad:—Held, that the declaration was bad for not shewing he had notice of the insurance being effected.

the plaintiff to insure his life, and that he would not do any act whereby any such insurance should be prejudiced. Averment, that the defendant did appear at the office of the Rock Insurance Company, and answer certain questions; that the plaintiff did, within a reasonable time, insure the defendant's life in the office of the said company, and that the policy was subject to a condition, that, if the defendant should go beyond the limits of Europe, the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, &c. To this declaration the defendant demurred, assigning for reasons, that, although the declaration stated that the defendant knew that the plaintiff intended to effect a policy of insurance, it did not shew that he had any notice that such policy had been effected, or of its containing the particular condition on which the present action was brought. Joinder.

The Court held, that the defendant being bound to take notice of the conditions of the policy, the declaration was bad for want of averring that he had notice of the policy having been effected, the defendant having no means of knowing at what office, or the terms of their policies, at which the plaintiff might at his own option insure.

BIRCH *v.* GIBBS, T. T. 1816. K. B. 6 *M. & S.* 115.

The word "lands" will be construed into land*.

IN covenant on a demise stated in the declaration to be of lands, it proving by the deed to be merely a piece of land of about an acre.

The Court held, that it was no variance. The term "lands" is general import, and may mean land.

---

3. *Amendment of.*

BOYS *v.* ARNELL, E. T. 1838. C. P. 5 *Bing. N. S.* 370.

A variance with respect to the parties may be amended at the trial.

UPON an agreement between the plaintiff on the one part, and the defendant with others on the second part, for the execution of a lease, with the usual covenants, and for due performance, each of the parties bound himself in a penalty to be recovered as liquidated damages, the declaration described it as an agreement between the plaintiff and defendant, who had alone executed—

The Court held, that the variance, whether fatal or not, was one which the Court, under 3 & 4 Will. 4, c. 42, s. 23, might amend, as it would not vary the substantial defence to the action.

* Where, in covenant for non-repairing, the declaration set out the demise in the lease of certain premises, with the appurtenances, (except as therein excepted), habendum, with a similar exception, for the term of twelve years, except the last day thereof, but in the lease produced the only exception was the last-recited one, applying to the last day of the term:—Held not to be a material variance. (*Williams* v. *Wayes*, 9 Price, 642).

(*c*) As to Oyer.

PAINE *v.* EMERY, T. T. 1835. Ex. 2 *C. M. & R.* 304; S. C. 4 *D. P. C.* 191.

A defendant who sets out a deed on oyer cannot demur on the ground of a variance, as he makes it part of the declaration.

DECLARATION in covenant on a deed made between the defendant and James Paine, deceased, dated the 3rd of December, 1835, whereby, according to the declaration, the defendant covenanted with the said James Paine, his executors, administrators and assigns, that he, his heirs, &c., should pay unto the said James Paine, his &c., the sum of 100*l.*, and interest for the same, at the rate of 5*l.* for 100*l.* for a year, on the 3rd of June then next ensuing the day of the date of the indenture, without any deduction. Breach, non-payment of the said sum of 100*l.* to the testator or to his executors, or to the plaintiffs, who are the surviving executors. The defendant craved oyer of the deed, and it was set out. It was a mortgage of some premises at Gamlingay in Cambridgeshire, and the covenant for the repayment of the money was, that the defendant should pay it unto the said James Paine, his &c., at or in the porch of the parish church of Gamlingay aforesaid. The defendant demurred specially, and the plaintiff joined in demurrer.

Per Cur.—The covenant set out in the declaration being general, includes both the covenant to pay generally, and that to pay at a particular place, therefore that is not necessarily a variance; and as the deed set out on oyer becomes part of the declaration, the general breach applies to the covenant as set forth in the deed, and shews that the defendant is in default. *Abrey* v. *White*, (Carth. 301), and *Cage* v. *Acton*, (Ibid. 513), are in point for the plaintiffs. There must therefore be judgment for them.

(*d*) Particulars of demand.

SOWTER *v.* HITCHCOCK, T. T. 1837. B. C. 5 *D. P. C.* 724.

No particular allowed to dates and sums under covenants for non-payment of rent and want of repair.

IN an action of covenant by the assignee of a lease for non-payment of rent and non-repair, a rule was obtained, requiring the plaintiff to shew cause why he should not give further and better particulars, with sums and dates attached.

Per Coleridge, J.—The plaintiff does not seem to know more than the defendant. There is no reason for supposing, therefore, that if the application were granted any better particulars could be given by the plaintiff. If it should be said that the plaintiff may suggest breaches instead of assigning them, and that thus the defendant may be placed in a situation of difficulty, he may then go before a Judge at Chambers, who will see what is right to be done. The present rule must therefore be discharged.

(*e*) Of the pleas.

1. *In general.*

CARDWELL *v.* LUCAS, H. T. 1836. Ex. 2 *M. & W.* 111.

It is a good plea that the lease was not executed by the lessor or his

IN covenant by the assignee of the reversion against lessee, plea, not denying, that it was the plaintiff's deed, but alleging that the intended lessor had not executed the lease, nor was it signed by any agent lawfully authorized in writing. It appeared that J. H. being

agent lawfully authorized.*

seised in fee, by deed executed by the defendant, demised the premises for eleven years, under which the defendant entered and was possessed thereof. J. H. by will devised the estate to his widow for life, remainder to the plaintiff for life: the declaration alleged the death of J. H. and of the widow, whereby he became and was seised of the reversion for the term of his life.

The Court held, that, the covenants being annexed to a mere tenancy at will (the only interest that passed upon the assent of J. H. to the lease), and which tenancy determined on his death, the subsequent occupation for more than a year created a different tenancy, to which the covenants were annexed, and that the plaintiff could not maintain the action.

HILL *v.* SAUNDERS, E. T. 1825. K. B. 4 *B. & C.* 529; S. C. 7 *D. & R.* 17.

And the defendant may plead that the plaintiff's interest had been put an end to.

IN covenant the declaration stated that plaintiff and wife demised, and averred the death of the wife, and that the rent accrued subsequently; and the lease being set out upon oyer, the covenant appeared to be to pay rent to the plaintiff and wife, "their heirs and assigns." The plea alleged that plaintiff had nothing in the premises but in right of the wife, and that upon her death all his estate ceased, and that defendant was compelled to attorn to the heir of wife, who claimed the rent. Upon demurrer—

The Court held, that, although the defendant, by executing the deed, was estopped from saying that no interest passed from the plaintiff, yet that he might aver that plaintiff's interest had been put an end to; and that although such facts were informally pleaded, yet, as issues might have been taken upon them, it was in substance and effect a bar to the declaration; and judgment below was affirmed.

HUGHES *v.* HUMPHREYS, E. T. 1827. K. B. 6 *B. & C.* 680.

And to covenant, by a father against the master for not teaching his son, plea, that the son absented himself, is an answer.

IN covenant by the father against the master for not teaching, &c. on a deed of apprenticeship, to which only the plaintiff and defendant were parties.—Plea, that the apprentice absented himself, &c. Replication, the refusal by the defendant to take back the apprentice, and that this thereby discharged him. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never, after the apprentice was able to return to the service, requested defendants to receive him. Surrejoinder, that a little after the apprentice had so enlisted, the defendants refused then or ever to receive &c., and then and there wholly discharged &c. On demurrer—

The Court held, that the plea was a sufficient answer to the declaration, the default of the apprentice being to be considered as the default of the father, and the apprentice for this purpose not a mere stranger to the deed:—held also, that the subsequent pleadings to avoid the plea were bad, not alleging an offer to return into the service.

* If the defendant alleges a seisin in fee in his plea, and the plaintiff in the replication traverse that plea, he is at liberty to shew that A. had only an estate for life, and need not reply that specially. (*Hill* v. *Saunders*, H. T. 1824, N. P., 1 C. & P. 80; S. C. 2 Bing. 112).

SNELL *v.* SNELL, M. T. 1825. K. B. 4 *B. & C.* 749; S. C. 6 *D. & R.* 249.

DECLARATION in covenant, that the defendants had agreed to deliver to the plaintiff sufficient timber, growing on the premises, for the repairs of certain messuages, mills, and premises in the parish of Beaford, in the county of Devon; but that they had not delivered the timber, although there was sufficient growing on the premises for that purpose.

The Court held, that a plea (though informal, for not stating that there was not timber sufficient for the repairs, or any part thereof) was good, except on special demurrer.

So, to a declaration for not delivering timber for repairs, with averment that there was sufficient, plea, there was not sufficient, is good, if not demurred to, though it omits the words "or any part;"

BADEN *v.* FLIGHT, E. T. 1837. C. P. 6 *D. P. C.* 177; S. C. 4 *Bing. N. S.* 35; S. C. 3 *Scott*, 273; S. C. 3 *Bing. N. S.* 685; S. C. 4 *Scott*, 412.

DECLARATION in covenant on a lease, for two quarters' rent, ending on ——. The defendant pleaded that no quarter's rent ending on —— was due, upon which judgment on demurrer was given for the plaintiff; and he afterwards obtained a rule to amend the declaration, by withdrawing his claim as to that quarter, on payment of costs of the amendment, and the defendant obtained time to plead to the amended declaration.

but in covenant for — quarters' rent, ending on &c., plea, that no quarter's rent, ending on &c., was due, is bad.

BROOKES *v.* HEBERD, H. T. 1827. K. B. 8 *D. & R.* 69.

IN covenant by assignee against assignor of lease stating defendant's performance of covenants up to to the date of assignment, and a covenant for quiet enjoyment, and judgment by default; the breach assigned being a neglect to repair before the assignment, by means of which the plaintiff had been called upon to repair, and pay the costs of an ejectment, and plea, that the three months after notice upon which he was bound to repair had not expired at the time of the assignment; the under-sheriff, considering that the plea went to the whole declaration, had directed only nominal damages.

The Court held, that it was no answer to the allegation of the premises being out of repair at the time of assigning, and a new inquiry directed, although a breach may be inartificially assigned; yet if enough appears on the record to shew a breach, the plaintiff will be entitled to damages.

So, to a breach of covenant before assignment, the assignor cannot plead that he was only bound to repair after three months' notice, which time had not expired.

MERCERON *v.* DOWSON, E. T. 1826. K. B. 5 *B. & C.* 479; S. C. *D. & R.* 264.

DECLARATION in covenant against an assignee of demised premises. Plea, that defendant for a certain period was possessed of one-sixth of the premises, as tenant in common with A., B., and C.; and for another period of one-third, as tenant in common with B. and C.; and that he had not, by assignment or otherwise, any more or greater interest than as in this plea mentioned. On demurrer—

The Court held the plea bad both in form and substance, as admitting himself a possessor, but neither admitting nor denying the assignment, and as being in bar of the whole liability, whereas an

And one of several tenants in common cannot plead, he was only bound to repair to the extent of his interest.

assignee of part is liable to be charged for that part; but in the principal case the defendant, having a partial interest in the whole, was bound to point out, by plea in abatement, the other parties liable, and to compel the plaintiff to include them in his declaration.

SIMONS *v.* FARREN, M. T. 1834. C. P. 1 *Bing. N. S.* 272; S. C. 1 *Scott*, 105.

To covenant for rent, a plea that the tenant carried on a prohibited trade with the consent of the lessee, but was evicted by the heir-at-law of the lessor, must negative a license from the latter.

THE plaintiffs, who were assignees of a lease containing a covenant not to carry on, or permit, or suffer to be carried on, a certain trade upon the demised premises, without the license in writing of the lessor, &c., granted a sub-lease to the defendant, subject to the covenants of the original lease, and gave him a license to follow a trade (alleged by the original lessor to be the prohibited trade), subject to a proviso that such license should not exempt the defendant from payment of rent in consequence of the interference of the original lessor. The heir of the original lessor brought ejectment for a forfeiture, by reason of the breach of this covenant, by carrying on the trade, pursuant to the license, and the defendant suffered judgment by default. In an action of covenant by the plaintiffs for non-payment of rent, the defendant pleaded the leave and license by the plaintiffs to carry on the trade; that he entered the premises, and was using and carrying on the trade, when, by reason and on the ground that he so carried on the trade, and the forfeiture of the lease thereby, "one R. C., having good right and title to the said demised premises, as eldest son and heir-at-law to M. A. (the original lessor), before any part of the rent became due, brought an action of ejectment, and recovered judgment against the casual ejector, whereby, and before any rent became due, the defendant was evicted."

The Court held that this plea was bad, as it did not negative the leave and license of the superior landlord in writing, and did not shew any sufficient title in him to enter and evict the defendant.

---

2. *In particular.*

1.—*Fraud*.*

2.—*Limitation, Statute of.*

PAGET *v.* FOLEY, E. T. 1836. C. P. 2 *Bing. N. S.* 679.

To covenant for rent, a plea of six years is no answer under the 3 & 4 Will. 4, c. 27.

IN covenant by mortgagees in possession for arrears of rent due under an indenture of demise for a term of years.

The Court held, that a plea alleging that the sum sought to be recovered did not, nor did any part thereof, become due at any time within six years next before the commencement of the suit, was bad upon demurrer, inasmuch as the 42nd section of 3 & 4 Will. 4,

* In covenant for non-performance of a contract under seal, plea, that it was obtained by fraud and covin:—Held, that the defendant was entitled to begin, although the damages were uncertain. (*Reeve* v. *Underhill*, N. P., 6 C. & P. 773).

c. 27, limiting the recovery of arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent, to within six years next after the same respectively shall have become due, is, pro tanto, repealed by the 3rd section of 3 & 4 Will. 4, c. 42.

3.—*Payment of Money into Court.*

MARSHALL *v.* WHITESIDE, H. T. 1836. Ex. 1 *M. & W.* 188; S. C. 4 *D. P. C.* 766.

If several breaches be assigned, money may be paid into court generally,

COVENANT on an indenture of lease made between the plaintiff of the first part and one A. G. and the defendant Eleonore of the second part, which contained covenants by the lessees within every third year to paint the outside of the premises demised with two coats of paint, and to paint or colour the outside stucco work of a uniform stone colour; and also in every seventh year during the term (which was for twenty-one years determinable by the lessees at the end of the first seven or fourteen years) to paint all the inside of the premises with two coats of paint. There was also a covenant to keep the premises in repair during the continuance of the term, and to deliver them up in good condition at the end of the term. The marriage of the defendants was alleged, and it was averred that, after the marriage, the defendants gave notice to determine the lease at the end of the seven years, and it was accordingly determined. The plaintiff then assigned five distinct breaches of these covenants, alleging that the said A. G. and the defendant Eleonore, before her marriage, and the said A. G. and the defendants since their intermarriage, did not perform them. The defendants pleaded to the first three breaches, that A. G. and the said defendants did perform the covenants, traversing the breaches as stated in the declaration. To the fourth and last breaches, they pleaded, that they brought into Court 90*l.*, to be paid to the plaintiffs, and that she had not sustained damages to a greater amount in respect of the breaches of covenant fourthly and lastly above assigned. Special demurrer to all the pleas, assigning for causes that the issue tendered by the first three was too large, and that the payment of money ought to have been made separately to each breach.

The Court held, that the defendant may plead a payment into Court of one sum in satisfaction of the damages sustained in respect of all the breaches.

WRIGHT *v.* GODDARD, E. T. 1837. Q. B. 3 *N. & P.* 419.

and such payment waives defects, which could be a ground of demurrer.

IN an action of covenant, the declaration contained breaches on several covenants, the assignments of which would have been bad on demurrer, but the defendant, amongst others, pleaded payment of £—— into Court, and that the plaintiff had sustained no greater damages in respect of the causes of action in the declaration mentioned.

The Court held, that such plea must be taken to admit some damage upon every part of the breach of covenants in the declaration, and that the defects in the allegations were thereby waived.

4. *Adding Pleas.*

MUNNINGS *v.* LENNOX, H. T. 1828. C. P. 12 *Moore*, 134.

Defendant pleaded eighteen pleas, and the plaintiff demurred to two and succeeded; the Court refused to allow other pleas to be added.

IN an action of covenant on a charter-party, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and after argument obtained judgment.

The Court held, that the defendant could not afterwards file additional pleas, although it was sworn that facts had come to his knowledge material for his defence since the argument on demurrer, and with which facts he was then unacquainted.

(*f*) OF THE REPLICATION.

PAUL *v.* NURSE, M. T. 1828. K. B. 8 *B. & C.* 486.

Covenant, not to assign. Plea, that, before rent became due, defendant assigned. Replication, there should have been a license: —Held a bad replication, being the subject of a cross-action.

ACTION of covenant by the representatives of the lessor against the assignees of the lessee. Several breaches were assigned, charging non-payment of rent, not repairing, want of good husbandry, &c. The declaration also set out a covenant in the lease, which provided that it should be lawful for the lessee, his executors, or administrators, upon the determination of the term (but not before), to take down and remove a certain windmill or grist-mill, round-house, and other buildings then standing, or thereafter to be erected and built upon part of the demised premises. The breach assigned upon this covenant was, that, before the determination of the term, the defendants (being assignees of the term) did take down and remove from and off the demised premises the said windmill or grist-mill and round-house, and kept and continued the same so taken down and removed for a long space of time, to wit, from thence hitherto, whereby the value of the demised premises, and the security for the rent, were greatly diminished. The defendants, after other pleas, pleaded, fifthly, as to the non-payment of rent, that, after the assignment to them, and before any part of the rent mentioned in the declaration became due, the defendants assigned the premises, and all their interest therein, to one Edmund Nurse, the elder, to hold to him the said E. N. for the remainder of the term, and that the said E. N. entered by virtue of that assignment. To this plea, the plaintiffs replied, that, in the indenture, the lessee covenanted for himself, his heirs, executors, administrators, and assigns, that he, his executors, or administrators, would not assign during the term without the consent of the lessor, and that the lessor had never given any consent to the lessee to assign to any person. To this replication the defendants demurred and the plaintiffs joined in demurrer.

Per Cur.—Your remedy is only on the covenant for damages. Here you are not going for damages by reason of the breach of that covenant; you are suing for the rent upon the supposed privity of estate. The privity of estate is gone; if you like you may bring an action against them for destroying that privity.—Judgment for the defendants.

(*g*) Of the evidence.

Earl of Falmouth *v.* Moss, H. T. 1824. Ex. 11 *Price*, 455.

In covenant by a remainder-man for not repairing. Plea, that lessor was only tenant for life—

After notice to produce, parol evidence may be given*.

The Court held, that, after notice served on the plaintiff to produce a specific deed, the steward might be called to prove the existence and nature of it; and although the possession of the steward might be considered as the possession of his principal, so as to protect him from producing it under a subpœna duces tecum, his knowledge of contents was not within the principle of privileged communications, which extends not beyond counsel and attornies.

Pearce *v.* Morris, E. T. 1832. K. B. 3 *B. & Ad.* 396.

This was an action of covenant brought by the clerk of the trustees of a turnpike-road against the defendant as surety to one Richards. A demise had been made to Richards of a toll-gate and tolls at the rent of 180*l.* per annum, for the due payment of which by Richards the defendant became surety. The declaration made profert of the indenture, to which non est factum was pleaded. The original lease itself was in Court, stamped likewise with a 30*s.* stamp only. By the 55 Geo. 3, c. 184, sched., Part I., on a lease or tack of any lands, hereditaments, or heritable subject, where the yearly rent shall amount to 100*l.* and not amount to 200*l.*, a stamp duty is payable of 2*l.*; and for a counterpart or duplicate of such lease is payable a duty of 30*s.* It was objected at the trial that on making profert of the deed, the plaintiff was bound to produce in evidence the original deed; and as the indenture of lease itself was not properly stamped, no evidence could be given of it by the production of the counterpart, bearing a proper stamp for a counterpart. This objection was overruled, and a verdict passed for the plaintiff for a sum of 10*l.*, with leave to move to enter a nonsuit.

A profert, "which said indenture &c.," is supported if the counterpart, executed by the defendant, be produced, although the original lease be improperly stamped.

Lord *Tenterden*, C. J.—I think that the terms of the declaration were satisfied by the production of the counterpart.—Rule refused.

Green *v.* James, T. T. 1840. Ex. 6 *M. & W.* 656.

The survivor of three lessors brought an action of covenant against the defendant for not repairing, and leaving in good repair at the end of the term. Plea, that the lessors had a reversion for a longer term expectant on the lease, and that after the death of one, the survivors assigned the reversion to a third party; replication, that the lessors were not possessed of the reversion, modo et formâ, as alleged in the plea. On demurrer—

Under a declaration, that the lessors made a lease, it must be proved that they had the reversion.

The Court held the replication bad, as a departure from the declaration, which, in substance, shewed that the demurring parties had the reversion, in stating that they made the lease.

* Where a deed of covenant is in the possession of an attorney for the benefit of third parties, he is not bound to produce it. (*Ditcher* v. *Kenrick*, T. T. 1824, N. P., 1 C. & P. 161).

HAWKS *v.* ORTON, E. T. 1836. Q. B. 5 *A. & E.* 367.

An occupation is not proved, by shewing that the defendant refused to allow plaintiff to enter.

IN covenant by lessee, stating as a breach, that the defendant entered upon plaintiff's possession, and expelled and removed him, upon which issue was joined; and it appeared that the plaintiff had never entered; but, upon going to take possession under the demise, was refused admission by the defendant, who continued to occupy the premises.

The Court held, that the plaintiff could not recover.

WHITEHEAD *v.* TATTERSALL, T. T. 1831. K. B. 1 *Ad. & E.* 491.

But an award of damages is evidence of the amount in covenant, unless the award be impeached.

COVENANTOR and covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator. In an action on the covenant—

The Court held, that the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached.

(*h*) WHO TO BEGIN.

SOWARD *v.* LEGGATT, M. T. 1836. N. P. 7 *C. & P.* 613.

In covenant for non-repair, if the plaintiff alleges the want of repair, which the defendant denies, the plaintiff must begin.

IN an action of covenant to repair, the breach was that the defendant did not repair, but suffered the premises to be ruinous, &c. Plea, that the defendant did repair, and did not suffer the premises to become ruinous, &c. The defendant claimed the right to begin.

Per Lord *Abinger*, C. B.—In many cases a party, by a little difference in the drawing of his pleadings, may make it either affirmative or negative, as he pleases. The plaintiff here says, "You did not repair"; he might have said, "You let the house become dilapidated". I shall endeavour by my own view to arrive at the substance of the issue, and I think in the present case, that the plaintiff's counsel should begin.

REEVE *v.* UNDERHILL, M. T. 1834. N. P. 1 *M. & Rob.* 440; S. P. WOOLLER *v.* BARTON, M. T. 1835. N. P. 1 *M. & Rob.* 518.

If the affirmative be on the defendant, he begins.

DECLARATION in covenant, first, that the defendants would assign a lease to the plaintiff; and, secondly, that they would also make over to him the fixtures upon the premises. Breaches, first, that the defendants would not assign the lease to the plaintiffs; secondly, that the defendants would not make over the fixtures to the plaintiff. Plea, that the deed was obtained by the plaintiff from the defendants by fraud and covin. Replication, traversing that allegation and issue thereon. The defendants claimed the right to begin; the affirmative of the issue lying on them—

And of that opinion was *Tindal*, C. J.

LEWIS *v.* WELLS, 1835. N. P. 7 *C. & P.* 221.

As, if the pleas be all affirmative.

IN an action of covenant for non-repair, &c., the defendant pleaded affirmative pleas, which were denied by the replication. The defendant claimed the right to begin, as the affirmative of all the issues was on the defendant.

Coleridge, J.—The old rule was, to look at the record and see on

whom the affirmative lay; and I think that the new rule of the Judges has not varied it in actions of contract. The defendant's counsel should begin.

(*i*) Rule to compute.

Morris *v.* Thompson, H. T. 1836. C. P. 4 *Scott*, 295.

No rule to compute in covenant for non-payment of rent and land-tax.

In an action of covenant, for non-payment of rent and land-tax, after judgment by default, on motion for a rule to compute—

The Court refused to grant it.

(*k*) Of the damages.

Manack *v.* Ellis, M. T. 1827. K. B. 1 *M. & Ry.* 511.

If a plea does not cover the breach, the jury should assess the damages on the breach pleaded to only, and be discharged as to the rest*.

This was an action of covenant. The declaration stated, "That by indenture, dated the 23rd of September, 1820, the plaintiff demised to the defendant a certain messuage, tenements, farm, and premises, with the appurtenances, situate, &c., to hold to defendant from the 29th of September aforesaid, for thirteen years, at a certain rent; and that the defendant thereby covenanted with the plaintiff, that he, the defendant, would at his own expense provide, sow, and harrow in, the usual quantity of good clover, and other grass seeds, in such part of the demised premises as should be tilled with barley and oats from time to time during the said term; and also would use and employ on the said premises all such dung, straw, soil, compost, ashes, and manure, as should arise or be made thereon during the said term, and at the end would leave the same on the premises for the plaintiff." There were in this count three other breaches of covenant assigned; the 2nd was to the following effect: "That the defendant did not use and employ on the said premises all such dung, straw, soil, compost, ashes, and manure, as were made thereon during the term, according &c.; but the said defendant since &c., to wit &c., and on divers &c., took and carried away off and from the said premises divers large quantities, to wit, two hundred cart-loads of straw, two hundred cart-loads of soil, two hundred cart-loads of ashes, and two hundred cart-loads of manure, which had arisen and been made on the said premises during the said term, and spent and consumed the same elsewhere than on the premises, contrary &c." There was another count in the declaration assigning other breaches. The defendant pleaded, first, non est factum; secondly, tendering issue on the first breach; thirdly, as to the

* Upon a covenant to pay money on a stated day, and interest:—Held, that the party could not recover for interest after that period beyond the damages laid for the detention, nor could the declaration be amended by inserting larger damages to recover the sum due. (*Watkins* v. *Morgan*, 1835, N. P., 6 C. & P. 661). Upon a covenant in a lease of a colliery for payment of one-third of the money arising from the sale of coals raised and sold, coupled with another to keep true accounts of all coals raised, and to deliver true copies to the lessor:—Held, that the calculation must be made on the amount of coals sold and not of the money actually received:—Held, also, that the accounts kept by the account-keeper appointed by the parties working the colliery were after his death admissible in evidence as charging himself, and as admissions made by the lessee's agent. (*Edwards* v. *Rees*, 1836, N. P., 7 C. & P. 340).

second breach, "that he did not take and carry away from the premises the said straw, compost, ashes, and manure, in that breach mentioned." Upon the other breaches he tendered issue. The plaintiff joined issue. It was then stated by the plaintiff's counsel, that he would of course be entitled to a verdict on the issue of non est factum. This was admitted; but he also submitted to the learned Judge, that he should of necessity be entitled to a verdict on the issue arising out of the second breach, as the defendant's plea had not answered the breach; the breach being in respect of the straw, soil, ashes, and manure, so that the breach as to the soil was not answered. *Burrough*, J., was of this opinion; and a verdict was taken for the plaintiff with 1*s.* damages; the defendant being at liberty to move for a new trial. On motion for a new trial—

Per Cur.—The proper course would be to enter the verdict for the plaintiff on the issue of non est factum; for the defendant, on the issue arising out of the second breach, then an assessment of damages as to the "soil," or an assessment generally as to the premises in the second breach not answered by the plea; and a discharge of the jury as to the other issues.

(*l*) Of the costs.

Croft *v.* Miller, T. T. 1837. C. P. 2 *Bing. N. S.* 975.

The lower rate of costs under Rule 4 Will. 4, does not apply to writs of inquiry in covenant for unliquidated damages.

In covenant, the declaration alleged, that the defendant agreed to pay the costs of a demurrer in a Chancery suit, and also the costs of a writ of attachment issued against the plaintiff for non-payment thereof. The breach alleged was, that defendant did not pay, in consequence of which the plaintiff was arrested under the writ of attachment, and detained in custody, &c., and was obliged to pay a large sum, to wit, &c. Upon judgment and writ of inquiry executed before the sheriff, the damages were assessed at a sum under 20*l.* The officer having taxed the costs according to the reduced scale annexed to the Order of the 15th of March, 1834, rule for a review of the taxation upon the ground, that the writ of inquiry on a covenant of this nature was not within the rule, and that the costs should be taxed according to the usual scale.

Tindal, C. J., observed, that he was strongly inclined to think that this action for breach of a covenant of this nature was not within the rule, which in his opinion extended only to debts and demands. The great object would be the attainment of a uniformity of practice, and for this purpose the Court would consult the other Judges and then send their certificate.

The Court afterwards certified to the prothonotaries that the rule for the review of the taxation should be made absolute.

Daubuz *v.* Rickman, M. T. 1833. C. P. 1 *Scott*, 164.

Reference to arbitration before issue joined, costs to abide the event:—Held, that the

In an action of covenant, before the issue made up, the cause was referred to arbitration, the costs to abide the event, and the arbitrator found, that, as to one breach, the plaintiff had sustained damages to a certain amount, but, as to the rest, that he had no cause of action—

The Court held, that the defendant was entitled to the costs of the issues found for him, although the cause was not at issue.

defendant was entitled to the costs of the issues found for him, although no issue joined.

Coverture*.

See also tit. *Husband and Wife.*

Powell *v.* Duncan, E. T. 1837. B. C. 5 *D. P. C.* 550.

By Rule H. T. 4 Will. 4, it is provided, that no plea puis darrein continuance shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading such pleas, or unless the Court or Judge shall otherwise order. After obtaining a rule to plead coverture puis darrein continuance, another application was made to dispense with the affidavit of verification.

Coverture may be pleaded puis darr. cont.

Per Williams, J.—I cannot grant another rule. These terms should have been engrafted in the former rule—it is now too late.

Credit not Expired. See tit. *Contract.*

Criminal Conversation†.

Willis *v.* Bernard, E. T. 1827. C. P. 8 *Bing.* 376; S. C. 1 *M. & Scott*, 584.

In an action for criminal conversation, it appeared that the plaintiff and his wife were residing in Canada, when the plaintiff, being called by business into England, had left his wife in that colony, taking his mother with him. By a cross-examination of a witness who proved the above facts, the defendant's counsel endeavoured to insinuate, that the plaintiff and his wife were not on good terms with each other, and that she felt offended in being left in Canada alone. To shew the state of the wife's feelings towards her husband, the plaintiff's counsel then offered in evidence a letter written by the wife to her husband's mother shortly after the husband sailed for England, and before the adulterous intercourse with the defendant commenced. The reception of this letter in evidence was objected to on two grounds: 1st, that it was addressed, not to the husband, but to a third party; 2nd, that it contained only evidence of a particular fact, viz. the wife's offer to transfer her property to her husband; whereas, if admissible at all, it could only be received on the ground of being evidence of the general state of her feelings. *Tindal*, C. J., received the letter, subject to the opinion of the Court, considering it admissible, so far as it amounted to evidence of the state of the wife's feelings. The jury found for the plaintiff. On motion for a new trial—

A letter written by the wife whilst abroad to a third party before the criminal connection is evidence.

* This plea is not within the rule as to non-joinder. See post, tit. *Husband and Wife.*

† The jury giving more damages than laid in the declaration, in an aggravated case, no ground for a new trial. (*Masters* v. *Barnwell*, 7 Bing. 224).

The Court held, that the letters of the wife, written to a third party before the commencement of the adulterous intercourse, were admissible in evidence, to shew the state of the wife's feelings towards her husband, notwithstanding such letters may chiefly relate to facts which could not strictly be evidence.

Cross Action*.

Crown Debt. See tits. *Extent—Prerogative of the Crown.*

Crown Grants—See tit. *Prerogative of the Crown.*

Curate. See tit. *Ecclesiastical Persons.*

Curtesy. See tits. *Copyhold—Husband and Wife.*

Custom.

See tits. *Common—Copyhold—Corporation—Covenant—Tithes—Landlord and Tenant.*

BLEWITT *v.* TREGONNING, T. T. 1835. K. B. 5 *N. & M.* 300.

It seems that a custom and a prescriptive right cannot co-exist.

IN trespass to try the validity of a custom for all the inhabitants for the time being of the parish of A., occupying messuages and lands within the parish, to take sand which had been drifted upon the plaintiff's close from the sea-shore. The evidence established a custom and a prescriptive right. The jury found for the defendant. On motion for a new trial—

* The non-compliance with a covenant to sail by the first wind is not an answer to a suit for the recovery of freight, it being the subject of a cross action. (*Bormann* v. *Tooke*, 1 Campb. 377). So, in an action against an artist for unskilfully varnishing prints, the production of the record of a judgment at his suit against the owner for work and labour generally, is no defence, although it be shewn that no objection was then made on the score of the imperfection of the workmanship. (*Shrikenrick* v. *Lucas*, 1 Esp. 42. See also 2 Campb. 63; 1 Campb. 190). From the anxiety evinced by the Courts to prevent circuity of action, it is difficult to lay down a general principle as to where a cross action would be deemed necessary. The best rule appears to be, that it should only be resorted to where the matter of defence does not go to the whole of the plaintiff's complaint, or amount to an estoppel, or is capable of being made available as a set-off.

Per Cur.—Upon the question whether there can be a prescriptive right and a custom co-existing, as an abstract proposition we think it unnecessary to determine that point. As the evidence proved both a prescriptive right and a custom, and the jury having found for the defendant, we cannot interfere.

LAYBURN *v.* CRISP, T. T. 1838. N. P. 8 *C. & P.* 397.

A custom for the deputy-oyster-meter to have 8*s.* for the first 100 bushels, and 4*s.* 6*d.* a score afterwards, is legal.

AN issue from the equity side of the Court of Exchequer declared that the deputy oyster-meters of London had by custom the exclusive right, by themselves or their servants, of shovelling, unloading, and delivering all oysters, brought in any boat or vessel along the water of the Thames for sale, to every place throughout the port of London, and to have reasonable compensation for so doing; and it was found by the jury that 8*s.* for the first hundred bushels (double measure), and 4*s.* 6*d.* a score for the remainder of the cargo, was a reasonable compensation for the same. And—

The Court of Exchequer held the custom good, and the finding of the jury right.

TYSON *v.* SMITH, E. T. 1837. Q. B. 1 *N. & P.* 784.

So, a custom for innkeepers to erect booths at fair-time, on a common, paying 2*d.* to the lord;

BY custom, all persons exercising the trade of a victualler might enter on the soil where a fair was to be held, a reasonable time before it took place, and erect stalls and booths thereon for the more convenient carrying on of his trade, and keep them there until a reasonable time after the fair, paying 2*d.* to the lord of the fair. In trespass, the defendant had a verdict. On motion in arrest of judgment—

Per Cur.—The defendant sets up a custom for all persons to erect booths on a certain locus in quo, from one day to another; and he claimed, as victualler, a right to erect such a booth, and to keep it there during the whole period. The plaintiff's argument was to shew that this claim was bad in law; but we are of opinion that it is good. The description of a victualler is definite; and the attendance of that class of persons at a fair is necessary, in order to afford refreshment to the number of persons who resort there. The exclusion of the owner from his own soil may be lawful by virtue of a reasonable custom. It appears to us that it would be unreasonable if the argument for the exclusion of these parties could prevail: the fair itself, to which all trades of every class are invited to come and vend their goods, must be discontinued. As to the excess of persons exercising the trade of victuallers, their own interest must limit their number to such as have a fair chance of success.

JONES *v.* WATERS, H. T. 1835. Ex. 1 *C., M. & R.* 713; S. C. 5 *Tyrw.* 361.

or a custom in a corporate town, that a town-crier shall give all notices &c. within the

IN an action on the case for a disturbance, it was proved that for above a century there had been a person appointed by the bailiff of that borough to the office of town-crier, and that he had been accustomed exclusively to proclaim goods for sale within the borough of Brecon. He was one of the corporation officers, wore their livery,

borough, is good;

and received a bell on his first appointment, which bell had been transmitted from the different town-criers. No claim was made to proclaim goods in place of the owners, when these latter chose to cry them; but the plaintiff claimed the exclusive right of making proclamation when any crier was required. It was contended, on the part of the defendant, that this right was not legal, as it was a monopoly without consideration; and further, that the plaintiff was improperly described in the declaration as entitled to it by virtue of his office. *Parke*, B., left it to the jury to say whether the office and the right claimed had existed immemorially, and gave leave to move to enter a nonsuit on either of those objections. The jury found a verdict for the plaintiff. On motion for a nonsuit—

Per Cur.—The question now raised is whether, in point of law, such a custom is good; and we can see no reason, from the nature of the thing, why such a custom is necessarily bad. Such a right must have originated long before the art of printing was discovered; and we can easily suppose much more importance to have belonged to this office in early times than at the present day. It is enough for us to say that we cannot see that the custom is of necessity bad. Rule discharged.

BLEWITT *v.* TREGONNING, T. T. 1835. K. B. 5 *N. & M.* 234; S. C. 3 *A. & E.* 554.

but a custom to take a profit in alieno solo is bad.

ON the question whether a custom for all the inhabitants for the time being of a particular parish, occupying messuages and lands within the parish, to take sand which had been drifted upon the plaintiff's close from the sea-shore, could be sanctioned—

Per Cur.—It appears perfectly clear to us that this is not a good custom. There can be no doubt that the sand was part of the soil, and inseparable from it; and if there was any possibility of distinguishing the sand from the soil, there ought to be some limitation to the quantity to be taken.

TAYLOR *v.* DEVEY, M. T. 1837. K. B. 7 *A. & E.* 400; S. C. 2 *N. & P.* 469.

So, in perambulating parish boundaries, a custom to go through a particular house, not within the limits, cannot be supported.

THE evidence established a custom for parishioners, in perambulating the parochial boundaries, to go through a particular house in the parish, which was not on the boundary line, or in any manner required in the course of perambulation. In an action of trespass by a party whose house was situate in the parish against other parishioners for the exercise of such an alleged customary right, the jury, under the direction of Lord *Denman*, C. J., found for the defendant. On a rule for a new trial—

Per Cur.—It is obvious the right to perambulate boundaries cannot confer a right to enter any house in the parish, however remote from the boundaries and although not required to be entered for any purpose connected with the perambulation; it seems to follow that a custom giving the right to enter a particular house, which is neither on the boundary line, nor in any manner wanted in the course of perambulation, cannot be supported. On principle, therefore, the custom is bad in law.

EVANS *v.* OGILVIE, H. T. 1827. Ex. 2 *Y. & J.* 79.

Plea of a custom, as to all farms within the parish, which were not under special agreement; replication traversing the custom:—Held, that the plaintiff could not shew he held under an agreement.

To an action of trespass, quare clausum fregit, defendant pleaded a custom applicable to all farms within the parish where the lands were situated, (not being exempted therefrom by any special agreement or otherwise), for the in-coming tenant to enter the premises, and take the dung, &c.; and so justified the trespass, averring that the lands were not exempted by special agreement or otherwise. The plaintiff traversed the custom, and newly assigned in the usual form. The rejoinder took issue upon the traverse, and the defendant pleaded not guilty to the assignment. The Chief Justice told the jury, upon the authority of *Boraston* v. *Green*, (16 East, Rep. 71), that the custom could not apply, it appearing that the farm was held under an agreement, and directed them to find a verdict for the plaintiff, with nominal damages.

Per Cur.—As the record is framed, it is clear that the plaintiff is precluded from proving that the lands were held under special agreement. By the general traverse of the custom, he has admitted that no such exception as is stated in the pleas applies to the land in question; and were the argument for the plaintiff to prevail, a defendant, who by the issue is led to expect that he will be called upon to prove the custom only, might at the trial be met with evidence of an exemption, which he would not be prepared to rebut. Such a course would be highly inconvenient, and we are clearly of opinion, that the plaintiff cannot upon this record resort to such evidence.

SHEPPARD *v.* HALL, E. T. 1832. K. B. 3 *B. & Ad.* 433.

A custom to seize false weights and measures must be strictly pursued, and appear on the face of a plea of justification.

IN an action of trespass for taking weights, &c., the defendants justified under a custom, by which a jury was sworn at the court leet of a manor to inquire and true presentment make of all persons within the manor who sold goods, and to see that their weights and measures were lawful and just, and to seize all such as were false and deceitful. They then stated, that the plaintiff, being resident within the manor, sold goods by weight; that "they, the said defendants, being on such jury," made inquiry and saw the weights of the plaintiff that they were false and deceitful; therefore, &c. At the trial, the jury found for the defendants. On motion for a new trial—

The Court held, that, in order to bring the defendants within the custom, all the jury must be present at the inquiry, and that the allegation not necessarily importing that they were all there was insufficient, whereupon judgment was entered for the plaintiff, non obstante veredicto for the defendants.

JENKINS *v.* HARVEY, M. T. 1835. Ex. 1 *C., M. & R.* 877.

If there be no evidence to the contrary, the jury may presume an immemorial right.

THE corporation of Truro claimed to have exercised immemorially the office of meter for measuring all coal imported and brought within the limits of the port of Truro, and further claimed an ancient toll of 4*d.* per chaldron, for measuring or being ready to measure coals, and keeping measures for the purpose of measuring, and 8*d.*

by the three tons for weighing; they also made their claim to it as a port duty. It was proved, that the toll had been received by the lessee of the corporation for the last sixty years without dispute, and that the corporation were owners of the port.

Williams, J., at the trial, told the jury that he knew of no rule of law which prevented them from presuming from this modern usage, that the right had existed immemorially; but pointed their attention to the large amount of the toll. He did not, however, advise them to presume an ancient legal origin to the right, nor state that it might be supported as a port duty. The jury found a verdict against the claim. But the Court granted a new trial, and said, if there be no evidence to the contrary, the jury may presume an immemorial right.

CUNNINGHAM *v.* FONBLANQUE, T. T. 1833. N. P. 6 *C. & P.* 44.

But a custom in trade can only be established by instances, and not mere opinion*.

IN this case, *Park*, J., thought that a usage in trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages, was not good for want of mutuality; and said, at all events, a usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely.

Custom House. See tits. *Excise and Customs.*

Customs and Excise. See tits. *Excise and Customs.*

Cutting and Maiming. See tits. *Indictment—Mayhem.*

---

* The general law as to a custom is, that if its existence at a distant time be shewn, and there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the reign of Richard the First, which is the time of legal memory. (*Lockhart* v. *Cooper*, 1837, N. P., 7 C. & P. 119). If a custom be the substantial question, and its existence is alleged by the defendant, he is entitled to begin. (*Bastard* v. *Smith*, 2 M. & Rob. 129).

Damages*.

See also tits. *Declaration—Inquiry, Writ of.*

I. RELATIVE TO THE MODE OF STATING DAMAGES IN PLEADING. See post, tit. *Declaration.*

II. RELATIVE TO THE CASES IN WHICH DAMAGES ARE RECOVERABLE.

(*a*) As to particular Forms of Action.

1. *Real.* See tit. *Dower.*

2. *Mixed.* See tits. *Ejectment—Quare Impedit—Waste.*

3. *Personal.*

1.—*Ex contractu.* See tits.

Assumpsit,
Covenant,
Debt,
Detinue.

2.—*Ex delicto.* See tits.

Case,
Replevin,
Trespass,
Trover.

(*b*) As to particular causes of action. See tits.

Adultery,
Annuity,
Apprentice,
Arbitration,
Assault and Battery,
Bills and Notes,
Bond,
Bribery,
Common,
Contract,
Copyhold,
Deceit,
Forcible Entry,
Game,
Highway,
Imprisonment,
Inclosure,
Insurance,
Libel,
Malicious Arrest,
Malicious Prosecution,
Mesne Profits,
Mortgage,
Party Wall,
Penalty,
Poundage,
Rescue,
Slander,
Tithes.

(*c*) As to miscellaneous proceedings. See tits.

Demurrer,
Error,
Feigned Issue,
New Trial,
Outlawry.

III. RELATIVE TO THE MEASURE OF DAMAGES, p. 338.

IV. RELATIVE TO THE MODE OF ASSESSING DAMAGES, p. 339.

* This term includes costs, (see ante, tit. *Costs*). In assumpsit, covenant, case, trover, and trespass, damages are the sole object of the suit; in debt, they are merely nominal.

V. RELATIVE TO CIRCUMSTANCES WHICH GO IN MITIGATION OF DAMAGES, p. 340.

VI. RELATIVE TO INCREASING AND REDUCING DAMAGES, p. 340.

VII. RELATIVE TO NOMINAL DAMAGES, p. 341.

VIII. RELATIVE TO DOUBLE AND TREBLE DAMAGES, p. 341.

IX. RELATIVE TO THE MODE IN WHICH DAMAGES ARE TO BE RECOVERED. See tit. *Execution —Judgment.*

III. RELATIVE TO THE MEASURE OF DAMAGES*.

YATES *v.* WHITE, H. T. 1838. C. P. 4 *Bing. N. C.* 272; S. C. 5 *Scott,* 640.

In an action for running down plaintiff's vessel, defendant not entitled to deduction in damages in respect of money received by the plaintiff from insurers of the vessel.

THIS was an action against the defendant for an injury done to the plaintiff's vessel by collision. The matter was referred; and the underwriters, after the commencement of the action, which was brought by the direction of the plaintiff himself and for his own benefit and advantage, paid the plaintiff the amount of the injury against which insurance had been effected, and the arbitrator allowed the defendant the sum thus paid by the insurers, and awarded the plaintiff nominal damages.

The Court held that such allowance was wrong, and that the damages should be increased to the amount of the sum paid by the underwriters, inasmuch as the recovery of damages to such extent by the plaintiff did not amount to a double satisfaction, he being only a trustee for the insurers.

STARTUP *v.* CORTAZZI, E. T. 1835. Ex. 2 *C., M. & R.* 165.

Where a vendee has advanced part of purchase-money for goods to be de-

THIS was an action of assumpsit for non-delivery of linseed, in accordance with a contract of sale. The plaintiffs proved that they had paid part of the purchase-money to the vendors in advance, which had not been returned, but had been paid into Court, with interest up to the time when so paid in, as a condition for a com-

* Where the defendants were let into possession of certain lands under a contract of sale, but did not complete the purchase and refused to pay the purchase-money :—Held, that the plaintiff could not recover the entire purchase-money, but merely damages for the breach of contract. (*Laird* v. *Pyne,* H. T. 1841, Ex., 7 M. & W. 476; S. C. 8 D. P. C. 860). Where A., having purchased of B. certain goods at a valuation, as between an outgoing and incoming tenant, commissioned the auctioneer who had valued the goods to resell them; before, however, he could do so, the sheriff entered and seized the goods under a writ of execution against B., and then employed the same auctioneer to sell the goods, which produced a sum considerably less than that at which they were valued. In an action against the sheriff for seizing and converting the goods, the Court held, that the jury might give damages equal to the amount of the valuation. (*Lockley* v. *Pye,* E. T. 1841, Ex., 7 M. & W. 139; S. C. 9 D. P. C. 744).

mission to examine witnesses abroad, and was only received by plaintiffs a short time before trial.

The Court held, that, in estimating the amount of damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial; and that as the plaintiffs did not prove any special damages from the non-delivery of the seed, and the non-payment of the money, the verdict was not wrong, when the jury considered that the plaintiffs had been satisfied by the payment of the purchase-money and simple interest upon it, and of the difference between the contract price and the price at the time stipulated for the delivery. See *Phillpots* v. *Evans*, (5 M. & W. 475, ante, tit. *Contract*).

livered, and the contract is not fulfilled by the vendor, the measure of damages is the interest on the money, and difference between contract price and the price of the article when it ought to have been delivered.

PRITCHET *v.* BOEVEY, T. T. 1833. Ex. 1 *C. & M.* 775.

THIS was an action of false imprisonment against a sheriff, for illegally arresting the plaintiff. The latter having applied to the Court to be discharged, the rule was referred to a Judge at chambers, who ordered him to be released from custody, and would have given him the costs of the rule if he would have undertaken to bring no action; but as he declined to do this, no order was made as to costs. These costs were alleged as special damages, and—

The Court held, they were recoverable.

In an action for false imprisonment, where the plaintiff is discharged by a Judge, he is entitled to recover as special damage the costs of applying for his discharge.

IV. RELATIVE TO THE MODE OF ASSESSING DAMAGES*.

NEWTON *v.* HARLAND, M. T. 1840. 1 *M. & G.* 645.

A VERDICT was found for the defendant, upon an issue which was a bar to the entire action.

The Court held, that contingent damages could not be assessed by the jury for the plaintiff, except with the consent of the defendant.

Contingent damages, where the defendant obtains a verdict, can only be assessed with his assent.

HILTON *v.* FOWLER, M. T. 1836. Ex. 5 *D. P. C.* 312.

IN an action against the defendant, for neglecting to provide for certain lambs sent to agist, the jury were of opinion that the plaintiff was entitled to recover; but a question arose as to the amount of damages. The plaintiff's counsel suggested, and the defendant's counsel assented, that, if the lambs had been properly taken care of, they would have been worth 30*s.* each. By consent the jury gavĕ a verdict accordingly. On motion to reduce the damages, on the ground that there was a mistake as to the value of the lambs—

Per Cur.—If the defendant's counsel thought the calculation of damages wrong, it should have been objected to at the time, and then the question would have been left to the jury. It is now too late.

If counsel assent to the measure of damages the Court will not afterwards interfere.

LEACH *v.* THOMAS, E. T. 1837. Ex. 5 *D. P. C.* 612; S. C. 2 *M. & W.* 427.

A DECLARATION in assumpsit by outgoing tenant against incoming tenant assigned several breaches. No objection was made to the

If the jury give general damages upon ge-

* Where there are two counts in a declaration applicable, apparently, to separate and distinct injuries, there cannot be an assessment of damages on each, unless separate and distinct injuries be shewn. (*Holford* v. *Dunnett*, 7 M. & W. 348).

neral breaches, some ill assigned, but others well assigned, a *venire de novo* will be awarded.

first two breaches; but the third, which stated that the defendant *threatened* to carry away from the farm—and the fourth, that he *threatened* to carry away, &c., unless a certain sum was paid, were objected to as bad. The jury, however, had given a general verdict of damages on all the breaches. On motion in arrest of judgment—

Per Cur.—We cannot arrest the judgment. The cause must be tried again. Although we know the defendant has been guilty of and is liable for breaches, we cannot tell to what amount, as some of the breaches are badly assigned; there must be a *venire de novo*.

HAYTER *v.* MOAT, M. T. 1836. Ex. 5 *D. P. C.* 298.

But if the damages be assessed separately, judgment will only be arrested on the defective counts.

A DECLARATION against an administratrix contained nine counts. The first six alleged promises by the intestate; the seventh was an undertaker's account against her for the funeral expenses; the eighth was for goods sold and delivered to her as administratrix; the ninth was an account stated. No promise was stated in the seventh count; but the declaration concluded, that, in consideration of the promises, the defendant promised to pay the two last-mentioned sums respectively. The jury assessed separate damages on each count. On motion in arrest of judgment—

The Court said—If the verdict had been general, they would have arrested the judgment on all the counts; but as the damages are assessed upon each count, they could only arrest the judgment on the defective counts.

V. RELATIVE TO CIRCUMSTANCES WHICH GO IN MITIGATION OF DAMAGES*.

VI. RELATIVE TO INCREASING AND REDUCING DAMAGES.

BAKER *v.* BROWN, M. T. 1836. Ex. 5 *D. P. C.* 313; S. C. 2 *M. & W.* 199.

After verdict, in an action on a mortgage-deed for the principal, the interest cannot be added.

IN an action for principal and interest on a mortgage-deed, the cause was undefended. A verdict was taken only for the principal, the interest, by mistake, being omitted to be calculated. On motion for leave to amend the verdict by adding the interest—

Per Cur.—We cannot increase the amount of the verdict by adding the interest. The only way in which we could interfere would be by setting aside the verdict and granting a new trial.

HILLINGS *v.* YOUNG, E. T. 1836. C. P. 3 *Scott*, 170.

On the reduction of damages execution may issue for the rest.

A RULE had been obtained to reduce the damages.

The Court allowed the plaintiff at once to enter up judgment, and issue execution for that part of the damages which was not objected to, on his electing to forego the rest.

* In assumpsit for the carriage of goods and on an account stated, the defendant pleaded non assumpsit, part payment, and a set-off as to part. The cause was undefended; and the plaintiff proved a greater amount for carriage than he went for, but wished to allow the part payment and set-off, and take a verdict for

VII. RELATIVE TO NOMINAL DAMAGES.*

VIII. RELATIVE TO DOUBLE AND TREBLE DAMAGES.†

IX. RELATIVE TO THE MODE IN WHICH DAMAGES ARE TO BE RECOVERED. See tits. *Execution—Judgment.*

Debtor and Creditor.

I. OF THE PARTIES BETWEEN WHOM THE RELATIVE SITUATION OF DEBTOR AND CREDITOR MAY BE CREATED.

1. *Agents.* See tit. *Principal and Agent.*
2. *Assignees.* See tits. *Bankrupt—Bond—Covenant—Deed—Insolvent Debtor—Lease—Remainder—Reversion.*
3. *Auctioneers.* See tit. *Auction and Auctioneer.*
4. *Bankrupt.* See tit. *Bankrupt.*
5. *Bastard.* See tit. *Bastard.*
6. *Brokers.* See tit. *Principal and Agent.*
7. *Churchwardens.* See tit. *Churchwarden.*
8. *Commissioners.* See tits. *Bankrupt—Inclosure—Insolvent Debtor—Lunatic.*
9. *Drunkards.* See tit. *Intoxication.*
10. *Duress, Persons under.* See tit. *Duress.*
11. *Executors and Administrators.* See tit. *Executor and Administrator.*
12. *Feme Covert.* See tit. *Husband and Wife.*
13. *Gambler.* See tit. *Gaming.*
14. *Husband and Wife.* See tit. *Husband and Wife.*
15. *Idiots.* See tit. *Idiot.*
16. *Lunatics.* See tit. *Lunatic.*
17. *Outlaw.* See tit. *Outlawry.*
18. *Overseer.* See tit. *Overseers.*
19. *Partners.* See tit. *Partner and Partnership.*
20. *Servants.* See tit. *Master and Servant.*

the balance. The judge directed a verdict for the plaintiff for the balance, with an indorsement on the postea that the two other sums were allowed to the defendant. (*Butt* v. *Burke*, 1836, N. P., 7 C. & P. 806).

* If a jury be about to give a verdict for the defendant from inability to estimate the plaintiff's damage, the Court will allow the latter to enter a verdict for a nominal sum. (See *Feise* v. *Thompson*, 1 Taunt. 121).

† Double and treble damages are only given by statute. (1 Ld. Raym. 342; 4 B. & C. 154).

I. OF THE PARTIES BETWEEN WHOM THE RELATIVE SITUATION OF DEBTOR AND CREDITOR MAY BE CREATED—(*continued*).

21. *Smugglers.* See tits. *Bankrupt—Smuggling.*

22. *Stock Brokers.* See tit. *Stock-jobbing.*

23. *Trustees.* See tit. *Trustees.*

II. RELATIVE TO THE MODE OF CREATING THE RELATIVE SITUATION OF DEBTOR AND CREDITOR.

(*a*) In general, p. 344.

(*b*) As relates to property.

1. *Real Property.* See tits.

Annuity,
Common,
Covenant,
Fixtures,
Frauds, Statute of,
Landlord and Tenant,
Lease,
Mortgage,
Power,
Recognisance,
Release,
Rent,
Repairs,
Replevin,
Taxes,
Use and Occupation.

2. *Personal Property.* See tits.

Account stated,
Accounting, Action for not,
Action,
Apothecary,
Apprentice,
Attorney,
Auction and Auctioneer,
Bailment,
Bank of England,
Banker,
Bankrupt,
Barrister,
Bastard,
Bills and Notes,
Bottomry and Respondentia,
Canal,
Carrier,
Cheque,
Chose in Action,
Composition,
Contribution,
Copyright,
Corporation,
Deceit,
Distress,
Election,
Escape,
Exchange,
Executors and Administrators,
Fisheries,
Fixtures,
Frauds, Statute of,
Freight,
Goods bargained and sold,
Goods sold and delivered,
Guarantee,
Indemnity,
Infant,
Innkeeper,
Insolvent Debtor,
Insurance,
Interest,
Joint-Stock Company,
Landlord and Tenant,
Maintenance,
Master and Servant,
Money had and received,
Money lent,
Money paid,
Mortgage,
Parent and Child,
Partner,
Party Wall,
Poundage,
Principal and Agent,
Principal and Surety,
Printer,
Proctor,
Reward,
Salvage,
Scotch Bond,

II. RELATIVE TO THE MODE OF CREATING THE RELATIVE SITUATION OF DEBTOR AND CREDITOR—(*continued*).

Sheriff,
Ship and Shipping,
Smuggling,
Spirituous Liquors,
Stamps,
Stock,
Surveyor,
Theatres,
Tithes,
Tolls,
Trustees,
Use and Occupation,
Usury,
Wages,
Warranty,
Work and Labour,
Witness.

(*c*) As relates to services.

1. *Agents.* See tit. *Principal and Agent.*
2. *Apothecary.* See tit. *Apothecary.*
3. *Apprentices.* See tit. *Apprentice—Master and Servant.*
4. *Arbitrator.* See tit. *Arbitration.*
5. *Attorney.* See tit. *Attorney.*
6. *Auctioneer.* See tit. *Auction and Auctioneer.*
7. *Bail.* See tit. *Bail.*
8. *Brokers.* See tit. *Principal and Agent.*
9. *Carrier.* See tit. *Carrier.*
10. *Counsel.* See tit. *Barrister.*
11. *Executor and Administrator.* See tit. *Executor and Administrator.*
12. *Factor.* See tit. *Principal and Agent.*
13. *Guarantee.* See tit. *Guarantee.*
14. *Husband and Wife.* See tit. *Husband and Wife.*
15. *Infant.* See tit. *Infant.*
16. *Messenger under Fiat in Bankruptcy.* See tit. *Bankrupt.*
17. *Parish Officers.* See tits. *Churchwarden—Overseer.*
18. *Partners.* See tit. *Partner and Partnership.*
19. *Printers.* See tit. *Printers.*
20. *Proctors.* See tit. *Proctor.*
21. *Servants.* See tits. *Master and Servant—Principal and Agent.*
22. *Sheriffs.* See tit. *Sheriffs.*
23. *Sureties.* See tits. *Bail-Bond—Bills and Notes — Covenant—Guarantee—Principal and Surety.*
24. *Surveyors.* See tit. *Surveyor.*
25. *Wharfinger.* See tits. *Carrier—Wharfinger.*
26. *Witness.* See tit. *Witness.*

III. OF THE EFFECT OF THE CREATION OF THE RELATIVE SITUATIONS OF DEBTOR AND CREDITOR.

(*a*) In general, p. 345.

(*b*) As regards the remedies and rights of the creditor. See also tits.

Account stated,
Arrest,
Assumpsit,
Bankrupt,
Bills and Notes,
Contract,
Costs,
Covenant,
Cross Action,
Deed,
Distress,
Execution,
Extent,
Foreign Attachment,
Guarantee,
Indemnity,
Interest,
Judgment,
Lien,
Outlawry,
Partners,
Principal and Agent,
Transitu, Stoppage in,
Voluntary Conveyance.

(*c*) As regards the discharge or exoneration of the debtor. See tits.

Accord and Satisfaction,
Bankrupt,
Composition,
Estoppel,
Execution,
Executors and Administrators,
Insolvent Debtor,
Judgment,
Lien,
Limitation, Statute of,
Payment,
Receipt,
Release,
Set-off.

IV. RELATIVE TO THE CONSTRUCTION OF CONTRACTS BETWEEN DEBTOR AND CREDITOR, AND OF VOID CONVEYANCES, p. 345. See also tits. *Composition with Creditors —Voluntary Conveyance.*

II. RELATIVE TO THE MODE OF CREATING THE RELATIVE SITUATION OF DEBTOR AND CREDITOR.

(*a*) In general.

Fairlie *v.* Denton, T. T. 1828. K. B. 8 *B. & C.* 395.

Where parties agree that A. shall pay to B. the debt of C., it must appear that there was a debt defined and ascertained at the time.

A debt was due from A. to B.; and another debt, to the same or larger amount, was due from C. to A.; and A., B., and C. agreed that C. should be B.'s debtor instead of A., and C. thereupon promised to pay B. In an action by B. against C.—

The Court held, that, to make the transfer of a debt effectual, there must be, 1st, a clear and unequivocal admission by the debtor that he owes a defined and ascertained sum at the time; 2nd, an assent by him, at the request of his creditor, to pay a third person; and 3dly, an extinguishment of the debt due to the third person from the creditor.

RINGER *v.* CANN, T. T. 1837. Ex. 3 *M. & W.* 343.

Where a lease of premises, &c., is assigned for the benefit of creditors, and the assignees accept it, they are liable for the rent*.

IN an action of debt for rent of a mill and premises, it appeared that the lessee, being insolvent, had, by deed reciting his insolvency, assigned all his debts, stock, implements, crops severed as well as not, and all other his personal estate and effects whatsoever and wheresoever, in trust to pay the rent due and owing up to ——, and afterwards to distribute the surplus amongst his creditors—

The Court held, that the assignees having been found by the jury to have accepted the lease, the mill would pass under the assignment, and the assignees were liable for the rent.

III. OF THE EFFECT OF THE CREATION OF THE RELATIVE SITUATIONS OF DEBTOR AND CREDITOR.

(*a*) IN GENERAL†.

IV. RELATIVE TO THE CONSTRUCTION OF CONTRACTS BETWEEN DEBTOR AND CREDITOR, AND OF VOID CONVEYANCES.

LEWIS *v.* ROGERS, T. T. 1834. Ex. 1 *C., M. & R.* 48 ; *abridged*, post, tit. *Executor and Administrator.*

A general instrument, assigning the whole of the debtor's effects for the benefit of creditors, includes cattle.

AN insolvent assigned the whole of her "effects, stock, books, and book-debts" to a trustee, for his benefit, and that of her other creditors. The insolvent kept a shop, and also occupied a farm. The trustee took possession of three cows and a mare, as part of the farming stock. On the question whether the cattle passed under the words of the assignment—

The Court held, that the word "effects" was comprehensive enough to convey the cattle on the farm.

BINNS *v.* TOWSEY, H. T. 1838. Q. B. 3 *N. & P.* 88.

A deed, for the benefit of all creditors who should come in under it, executed by an insolvent in prison, without consideration or pressure, was void under 7 Geo. 4, c. 57‡.

AN insolvent debtor, during his imprisonment, without pressure or any new consideration, executed a deed whereby he assigned all his property to trustees, for the benefit of all his creditors who should choose to come in under it. On the question whether it was void under 7 Geo. 4, c. 57, s. 32—

Per Cur.—Every deed is void which is made by a person voluntarily after he has gone to prison ; the present deed therefore fulfils all the conditions mentioned in the act which makes it fraudulent; nor does it fall within the proviso in the 7 Geo. 4, c. 57, s. 32, which has been supposed to make this deed legal. We think the case of *Davies* v. *Acocks*, (2 C., M. & R. 461), quite right; but it does not govern the present.

* Where an account for goods furnished is made out to another party, and not to the defendant, it is to be presumed that the credit is given to the former, unless the contrary be shewn. (*Storr* v. *Scott*, M. T. 1835, N. P., 6 C. & P. 241).

† If a creditor, in calling on a debtor, makes a disturbance in the house of the latter, and refuses to leave without payment, the debtor is justified in turning him out of his house, using no more force than is necessary; but he has no right to imprison the creditor, or send him to a police-station. (*Green* v. *Bartram*, E. T. 1830, N. P., 4 C. & P. 308).

‡ See 1 & 2 Vict. c. 110, the Insolvent Act now in force, post, tit. *Insolvent.* Where a deed of assignment to creditors contained a proviso making it void in

Deceit.

See post, tit. *Warranty.*

I. RELATIVE TO THE ACTION OF, WHEN MAINTAINABLE.

(*a*) In general, p. 346.

(*b*) For false representations, p. 347.

1. *Before* 9 *Geo.* 4, p. 347.

2. *Since* 9 *Geo.* 4, p. 347.

II. RELATIVE TO THE ACTION OF, BY WHOM MAINTAINABLE, p. 349.

III. RELATIVE TO THE FORM OF ACTION, p. 349.

IV. RELATIVE TO THE DECLARATION, p. 350.

V. RELATIVE TO THE EVIDENCE, p. 350.

VI. RELATIVE TO THE WITNESSES, p. 351.

VII. RELATIVE TO THE DAMAGES, p. 351.

I. RELATIVE TO THE ACTION OF, WHEN MAINTAINABLE.

(*a*) In general.

Blofeld *v.* Payne, H. T. 1833. K. B. 1 *N. & M.* 353; S. C. 4 *B. & Ad.* 410.

Making articles exactly resembling those sold by another, though not inferior, renders the party liable to an action of deceit.

In an action on the case the declaration stated, that the plaintiff was the patentee of a metallic hone, which he used to wrap up in certain envelopes, and complained that the defendant sold hones wrapped up in papers similar to those of the plaintiff's, in consequence whereof the plaintiff was prevented from selling so many of his hones, and the hones of the plaintiff were deteriorated in character from the hones of the defendant being of an inferior quality. The jury negatived the fact of the hones being of an inferior quality. But on a verdict for the plaintiff for nominal damages—

The Court held it was immaterial as to the quality of the hones, as the gist of the action was the fraud, as selling the defendant's hones wrapped up in paper belonging to or made to imitate those of the plaintiff.

case of the debtor not making a full disclosure, &c.:—Held, upon proof of concealment, the creditors signing the deed might still proceed against him. (*Wenham* v. *Fowle*, M. T. 1834, K. B., 3 D. P. C. 43; abridged, post, tit. *Deed*). A voluntary conveyance by a debtor to trustees, for payment of scheduled creditors, cannot be enforced by them, if they have not by signing and sealing made themselves parties to the deed, their being named being only a direction to the trustees how the funds are to be applied for the benefit of the volunteer. (*Ganard* v. *Lord Lauderdale*, Chancery, 3 Sim. 1. See *Gordon* v. *Gordon*, 3 Swanst. 400). So, where a father and son executed a voluntary trust-deed for the payment of annuity creditors, and any such other debts as the trustees should think fit to be paid, and they afterwards executed a second deed, varying the former trusts, the Court refused to restrain the trustees from executing the latter trusts until they had performed the first. (*Walwyn* v. *Coutts*, Chancery, 3 Sim. 14).

JONES *v.* BRIGHT, E. T. 1829. C. P. 5 *Bing.* 533.

An action lies for deceit, though the defect be intrinsic, if the article be warranted.

IN an action of deceit, it appeared that the defendant supplied a copper sheathing for a vessel, which turned out after four months to be wholly defective, and the jury found that the decay was occasioned by some intrinsic defect in the quality of the copper.

The Court were of opinion that the plaintiff was entitled to recover damages for the insufficiency, though fraud was negatived by the jury. A party selling an article for a particular purpose must be understood to warrant it reasonably fit and proper for that purpose.

See Laing v. *Frageen,* 6 *Taunt.* 108; *O'Kell* v. *Smith,* 1 *Stark.* 108; *Bluett* v. *Osborne,* 1 *Stark.* 384; *Gardiner* v. *Gray,* 4 *Campb.* 144.

(*b*) FOR FALSE REPRESENTATIONS.

1. *Before* 9 *Geo.* 4.

CORBETT *v.* BROWN, M. T. 1831. C. P. 8 *Bing.* 33; S. C. 8 *M. & P.* 85; S. C. 2 *M. & M.* 108.

From a false statement fraud will be inferred.

THE plaintiffs being about to furnish goods to the defendant's son, the latter had referred them to his father as to the truth of his assertion that he had £— of his own property, to which the defendant answered that the fact was so in truth, he having lent that sum to his son on his note, bearing interest. In an action for deceit—

The Court held that it was a misrepresentation; and the jury having found a verdict for the defendant, granted a new trial, observing, that from the statement being false fraud must be inferred.

FOSTER *v.* CHARLES, M. T. 1830. C. P. 7 *Bing.* 105; S. C. 6 *Bing.* 396.

Where the jury found that the defendant intended no actual fraud, although fraud resulted, the Court refused to enter a verdict for the defendant.

IN this case it appeared that the plaintiff had been induced through the false representations of the defendant to employ a servant; and the Judge had drawn the attention of the jury to two classes of motive, viz. a false statement knowingly made with intention to benefit himself, and secondly, a desire to benefit another person; and directed them, that although he might have no intention to obtain any advantage for himself, yet that it would still be a fraud if he made false representations productive of injury to another, knowing such representations to be false; and the jury found for the plaintiff, adding, that they considered there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term.

The Court refused to enter a verdict for the defendant.

---

2. *Since* 9 *Geo.* 4, *c.* 14.

By 9 Geo. 4, c. 14, the re-

BY 9 Geo. 4, c. 14, s. 6, it is enacted, "That no action shall be brought whereby to charge any person upon or by reason of any

presentation as to the credit, conduct, or character of a third party, must be in writing.

representation or assurance made or given or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith."

LYDE *v.* BARNARD, H. T. 1836. EX. 1 *M. & W.* 101; S. C. 1 *Tywr. & Gr.* 250.

And that statute applies to representations as to the sources from which payment is to be derived.

THIS was an action for a false representation by the defendant, that a settlement was charged only with specific annuities, whereby the plaintiff was induced to advance money upon an annuity secured by a further charge on such settlement.

Lord *Abinger* and *Gurney*, B., (contrà, *Parke*, B., and *Alderson*, B.), held, upon the construction of the 9 Geo. 4, c. 14, that the representation not being made in writing could not be made the ground of an action, the term, *ability*, in the statute, being applicable to the sources from which it is derived.

SWAN *v.* PHILLIPS, T. T. 1838. Q. B. 3 *N. & P.* 447.

A referee stating that "you may safely lend A. B., I know he has property, the title-deeds are in my possession," is a representation within the 9 Geo. 4, c. 14.

THE defendant, an attorney, applied to the plaintiff for the loan of a sum of money to a third person, and said that the money might be safely lent on the party's promissory note, because the title-deeds of an estate which he had lately bought were in his possession, and nothing could be done without his knowledge, and that the lender would be perfectly safe in making the loan to the borrower upon such terms. In an action on the case against the defendant for misrepresentation—

The Court held, that it was a representation relating to the ability of another within the 9 Geo. 4, c. 14; and not being in writing that no action could be maintained.

HASLOCK *v.* FERGUSON, T. T. 1837. 2 *N. & P.* 269.

So, if made by a shopman authorized by the defendant for that purpose.

A., BEING requested to supply goods to B., required a reference, and was directed to C., whose servant gave a verbal representation, upon which the goods were supplied. B. paid over the proceeds of those goods, which were sold under such circumstances as to raise a strong suspicion of fraud, to C., in discharge of prior liabilities. In an action by A. against C. for the value of these goods—

The Court held, that evidence of the verbal representation was not admissible, and there being no evidence of fraud in C. independently thereof, the action was not maintainable; that the representation fell within the terms of the 1st section of the 9 Geo. 4, c. 14, and therefore could not be proved without a note in writing.

DEVAUX *v.* STEINKELLER, M. T. 1839. C. P. 8 *D. P. C.* 33; S. C. 6 *Bing. N. S.* 84.

And a representation made by one member of a firm as to the solidity

IN case, the declaration alleged, that the defendant made certain representations concerning the character and credit of the firm of A. & B., of which the defendant was also a member, whereby the plaintiffs were induced to supply goods to and to pay money on

account of the firm. The defendant pleaded no memorandum in writing according to the 9 Geo. 4, c. 14.

The Court held the plea an answer to the action: as a representation of the solvency of a firm by one of several partners for the purpose of obtaining goods, &c., for the firm, and which are obtained in consequence thereof, is within the 6th section of the 9 Geo. 4.

of the partnership is within the statute.

II. RELATIVE TO THE ACTION OF, BY WHOM MAINTAINABLE.

PILMORE *v.* HOOD, M. T. 1838. C. P. *7 D. P. C.* 136; S. C. *5 Bing. N. S.* 97; S. C. *6 Scott*, 827.

THE declaration alleged that the defendant entered into an agreement with one A. B. for the sale of a lease of a public-house for a certain sum, and that at and before the said agreement the defendant falsely, fraudulently, and deceitfully pretended and represented to the said A. B. that the trade of the said house had been at the rate of 180*l.* per month, all retail over the counter; and the said A. B, not being able to complete the contract, it was agreed between the plaintiff, the defendant, and A. B., that the plaintiff should become the purchaser instead of A. B., and at and before the agreement A. B. communicated to the plaintiff the agreement and representation as to the value of the house made by the defendant to him, of which the defendant had notice, and the plaintiff confiding in such representation agreed to become the purchaser of the premises for a certain sum, which he paid to the defendant. It was then alleged that the concern was not of the value represented by the defendant, as he well knew; and that by means of the premises the defendant falsely and fraudulently deceived the plaintiff in the sale, and thereby the premises were of little or no value.

The Court held, that the plaintiff might maintain the action, and that sufficient appeared to support it in the form adopted.

A. made a misrepresentation to B. about to purchase his business, B. not being able to do so, C. consented to stand in his place, to which A. consented:—Held, that C. might maintain an action for deceit against A.

III. RELATIVE TO THE FORM OF ACTION.

DOBELL *v.* STEVENS, H. T. 1825. K. B. *3 B. & C.* 623; S. C. *5 D. & R.* 490.

IN an action of deceit, it appeared that the vendor on the treaty for the purchase of the lease, good-will, &c., of a public-house, greatly misrepresented the profits of the trade and the rents of part of the premises, although the terms of the purchase were subsequently reduced into writing and the lease assigned.

The Court held that the plaintiff was not bound to proceed on the contract, and that an action on the case might be maintained, and evidence of the defendant's assertions received; notwithstanding such written memorandum being collateral to the thing sold, and therefore not likely to be mentioned in the contract.

The plaintiff may waive the contract, and bring an action for deceit.

IV. RELATIVE TO THE DECLARATION*.

Miles *v.* Dell, 1818. N. P. 3 *Stark.* 23.

A declaration in deceit, for delivering several casks of ale deficient in quantity, must shew that some one cask contained less than it ought.

Action on the case. The declaration only alleged the sale of hogsheads of ale, &c., and that the defendant, intending &c., did fraudulently, &c. deliver divers quantities of ale, &c., as and for the respective quantity so bargained and sold, whereas the said ale, &c., delivered at the said time &c., were respectively deficient in the full quantity they ought to have contained, and respectively wanted divers, to wit, —— gallons, &c.

The judge held the declaration insufficient, for want of any specific allegation that any one cask contained less than it ought to have done, but merely that the defendant had not delivered the quantities agreed for:—Held, also, that the plaintiff could not recover the sum overpaid in that form of action; and also that, after payment of the whole demand with his eyes open to the fraud, the excess was not money had and received to his use.

V. RELATIVE TO THE EVIDENCE†.

Hope *v.* West, M. T. 1837. C. P. 7 *Scott*, 876.

A. leased part of a wharf to B.; B. still continued to use A.'s name on the wharf, and thereby obtained orders:—Held, that parol evidence might be received to shew it was not intended.

In an action on the case for deceit, it appeared that the owner of the wharf known by the name of the A. B. wharf, at which the plaintiff's barges took in freight, had let part to the defendant by a lease, who had, by assuming the name, obtained freight of goods alleged by the plaintiff to have been intended for him. In an action for such false representation—

The Court held, that parol evidence was admissible that the defendant was not to use the name of the premises, notwithstanding the division of the wharf by lease; and that the want of an averment of particular instructions to forward goods by the plaintiff's barges, or of any specific fraud or false pretence or loss of freight, was no ground for arresting the judgment.

* In case, the declaration stated that the defendant falsely represented that in his public-house "his returns had averaged, and then averaged, 300*l.* per month." The evidence proved that he said he was "doing 300*l.* a month in the house:"—Held, to prove the allegation; and the fact that the defendant named his brewer, and stated that he kept a pass-book of his beer and spirits, and that the plaintiff did not inquire of the brewer nor ask for the book, is no answer to the action. (*Bowring* v. *Stevens*, T. T. 1825, N. P., 2 C. & P. 337). In case, the declaration stating that the defendant, on the sale of Teneriffe barilla, asserted that 7½ cwt. would produce a ton of soap, well knowing it would not do so, is not proved by shewing that he said he had made 7 tons of soap out of 51 cwt. (*Horncastle* v. *Moat*, 1824, N. P., 1 C. & P. 166).

† Statement of the plaintiffs at the time of delivering the goods to the party trusted by them:—Held to be admissible for them, there being no other evidence to connect the sale with the representation made by the defendant as to the party's solvency. (*Fellowes* v. *Williamson*, 1834, N. P., 1 M. & M. 307).

VI. RELATIVE TO THE WITNESSES*.

VII. RELATIVE TO THE DAMAGES†.

Declaration.

I. OF THE PARTIES TO.

(*a*) With reference to the form of action and subject-matter. See tits.

Account, Action of,
Action,
Adultery,
Arbitration,
Assault and Battery,
Assumpsit,
Bills and Notes,
Bond,
Bribery,
Charterparty,
Common,
Contract,
Copyhold,
Copyright,
Covenant,
Deceit,
Detinue,
Distress,
Dower,
Ejectment,
Escape,
Frauds, Statute of,
Freight,
Game,
Gaming,
Goods sold and delivered.
Guarantee,
Imprisonment,
Insurance from Fire,
Insurance on Lives,
Insurance, Marine,
Judgment,
Landlord and Tenant,
Libel,
Malicious Arrest,
Malicious Prosecution,
Money had and received,
Money lent,
Money paid,
Nuisance,
Party Wall,
Patent,
Penal Statute,
Replevin,
Seduction,
Ship and Shipping,
Slander,
Tithes,
Trespass,
Trover,
Use and Occupation,
Usury,
Wager,
Waste,
Way.

* An action of deceit against a party misrepresenting the credit of another is not a bar to an action against such person on the contract:—Held, therefore, that the wife of the latter might be called as a witness to shew the state of her husband's affairs at the time. (*Brant* v. *Robinson*, 1824, N. P., 1 Ry. & M. 48).

† Vendee against vendor, for a false and fraudulent misrepresentation of the value of a public-house:—Held, that proof of its actual value could not go in bar of the action, but only in mitigation of damages; the measure of damages being the difference between the actual value and that which the plaintiff was induced to give. (*Pearson* v. *Wheeler*, 1825, N. P., 1 Ry. & M. 303). So, where A. sold to B., for 95*l.*, two pictures, representing them as "a couple of Poussin's;" they were in fact not originals, but very excellent copies; B. did not offer to return them:—Held, that if the jury thought B. was deceived by the representation, he was not bound to pay the price agreed, but only such sum as the jury should consider their value. (*Lomi* v. *Tucker*, T. T. 1829, N. P., 4 C. & P. 15).

(*b*) With reference to the particular character or capacity of the party. See tits.

Alien,
Attorney,
Auctioneer,
Bail,
Bankrupt,
Carrier,
Corporation,
Executors and Administrators,
Infant,
Inn,
Insolvent Debtor,
Justice of the Peace,
Lunatic,
Master and Servant,
Overseers,
Parties to Actions,
Partners,
Principal and Agent,
Principal and Surety,
Sheriff,
Trustee,
Witness.

II. OF THE FORM OF ACTION.

(*a*) Actions, ex contractu. See tits.

Assumpsit,
Covenant,
Detinue.

(*b*) Actions, ex delicto. See tits.

Case, Action on,
Ejectment,
Replevin,
Trespass,
Trover.

III. OF DECLARING CONDITIONALLY OR ABSOLUTELY, p. 354.

IV. OF DECLARING BY THE BYE. p. 355.

V. OF THE TIME OF DECLARING, p. 355.

VI. OF THE DECLARATION, NOT BEING NOW THE COMMENCEMENT OF THE SUIT, p. 356.

VII. OF DECLARING AGAINST ONE DEFENDANT ON PROCESS AGAINST SEVERAL DEFENDANTS, p. 356.

VIII. AGAINST PRISONER. See tit. *Prisoner.*

IX. COMPELLING PLAINTIFF TO DECLARE, AND CONSEQUENCES OF NOT DECLARING IN TIME, p. 358.

X. FORM OF DECLARATION.

(*a*) Title of the court, p. 358.

(*b*) Of the term or day when filed or delivered, p. 358.

(*c*) As to the venue, p. 539.

(*d*) As to the description of the method by which defendant has been brought into court, p. 359.

(*e*) Statement of the form of action in accordance with the writ, p. 360.

X. FORM OF DECLARATION—(*continued*).

(*f*) Of the description of the character in which the parties are designated in the writ, p. 361.

(*g*) Of the word "whereas," p. 361.

(*h*) Statement of time, p. 361.

(*i*) Statement of the promise and breach, p. 361.

(*k*) Indorsement of time to plead, p. 362.

(*l*) Statement of cause of action, and manner of describing it in particular actions, and for particular causes of action. See tits.

Account stated,
Adultery,
Arbitration,
Assault and Battery,
Assumpsit,
Attorney,
Bail,
Bankrupt,
Bills and Notes,
Bond,
Bottomry and Respondentia Bond,
Bribery,
Carriers,
Case, Action on,
Charterparty,
Churchwarden,
Common,
Contract,
Copyhold,
Copyright,
Corporation,
Covenant,
Damages,
Deceit,
Detinue,
Distress,
Dower,
Ejectment,
Escape,
Excise and Customs,
Executor and Administrator,
Extortion,
Fish and Fishery,
Frauds, Statute of,
Game,
Goods bargained and sold,
Goods sold and delivered,
Guarantee,
Hundred,
Husband and Wife,
Imprisonment,
Infant,
Innkeeper,
Insolvent Debtor,
Insurance, Marine,
Insurance on Life,
Insurance from Fire,
Interest,
Judgment,
Landlord and Tenant,
Lease,
Libel,
Malicious Arrest,
Malicious Prosecution,
Master and Servant,
Mesne Process,
Money had and received,
Money lent,
Money paid,
Nuisance,
Partners,
Party Wall,
Patent,
Penal Statutes,
Post-horse Act,
Principal and Agent,
Principal and Surety,
Quare Impedit,
Qui Tam,
Rent,
Replevin,
Right, Writ of,
Sheriff,
Ship and Shipping,
Simony,
Slander,
Stock,
Tolls,
Trespass,
Trover,
Use and Occupation,
Usury,
Wager,
Waste,
Watercourse,
Way.

XI. JOINDER OF COUNTS, p. 362.

XII. STRIKING OUT COUNTS, p. 364.

XIII. OF DELIVERING OR FILING, p. 366.

XIV. OF THE NOTICE OF DECLARATION, p. 366.

XV. OF STICKING UP IN THE OFFICE THE DECLARATION OR NOTICE THEREOF, p. 368.

XVI. OF SETTING ASIDE THE DECLARATION, p. 368.

XVII. IN INFERIOR COURTS, p. 370.

XVIII. WHERE THE CAUSE HAS BEEN REMOVED, p. 370.

III. OF DECLARING CONDITIONALLY OR ABSOLUTELY*.

FISH *v.* PALMER, H. T. 1834. B. C. 2 *D. P. C.* 460.

On serviceable process, plaintiff has no right to declare before the expiration of eight days from the service of process.

THE summons was served on the 1st November, and the plaintiff declared de bene esse on the 7th. On that day the sum claimed by the plaintiff, with the amount of costs, was paid by the defendant. On motion to set the declaration aside—

Parke, J., said, the plaintiff had no right to declare before the expiration of the eight days, and therefore he was not entitled to the costs of the declaration.

* Antecedent to the Uniformity of Process Act, (2 Will. 4, c. 39), it was usual, with the view of expediting the proceedings, to declare on or after the return-day of the writ, without waiting for the time for appearance to the process to expire; but it was always optional whether the plaintiff would do so or not. This mode of proceeding was called declaring *conditionally;* that is, before appearance or bail put in and perfected; or *absolutely*, after appearance entered, or bail put in and perfected. The first restriction in declaring de bene esse was the Rule T. T., 1 Will. 4, which ordered that no declaration shall be filed or delivered until the expiration of six days from the service of the process, when not bailable, and six days from the time of the arrest in case of bailable process, and that such six days shall be reckoned exclusive of the day of service or arrest; but now, as the writ of summons and distringas requires an appearance to be entered within the eight days from the service of such process, and enables the plaintiff to enter an appearance for the defendant on the latter failing to do so, it follows that only two days would be gained by declaring after the expiration of the six days allowed by Rule T. T., 1 Will. 4; and it was decided in *Fish* v. *Palmer*, supra, that the costs of the declaration shall not be allowed if the plaintiff declares de bene esse before the eight days have expired. With regard to *bailable process*, the right to declare de bene esse is expressly regulated by Rule M. T., 3 Will. 4, which orders that, upon all writs of capias, when the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare de bene esse. In case special bail shall not have been perfected, and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and de bene esse against the defendant or defendants who shall have been arrested, and shall not have perfected special bail. Before the new rules in bailable actions, the plaintiff was entitled to deliver a declaration conditionally any time before bail were perfected; (*Wendover* v. *Cooper*, H. T. 1830, K. B., 10 B. & C. 614); but a declaration de bene esse is only good from the time of giving notice; and where the defendant therefore appeared before notice given, the declaration, and all subsequent proceedings, were set aside as irregular. (*Weddle* v. *Brazier*, M. T. 1832, Ex., 1 D. P. C. 639; S. C. 1 C. & M. 69; S. C. 3 Tyrw. 237).

BAISLEY *v.* NEWBOLD, T. T. 1835. Ex. 2 *C., M. & R.* 325; S. C. 4 *D. P. C.* 177.—S. P. GOSLING *v.* DUKE, T. T. 1835. Ex. 4 *D. P. C.* 179.

On bailable process, the right to declare de bene esse is not taken away or limited by Reg. Gen. 11, M. T., 3 W. 4*.

THE question was whether, since the Rule M. T., 3 Will. 4, the plaintiff in a bailable action is still at liberty to declare de bene esse immediately after the expiration of the eight days, and any time before bail above are perfected?

The Court took time to consider; and afterwards, in the case of *Gosling* v. *Duke*, (4 D. P. C. 179), said, We have consulted the other judges, and we think that the right to declare de bene esse has not been taken away; and the plaintiff is still at liberty to declare de bene esse at any time after the eight days, and before bail above are perfected, whether bail have been put in or not.

IV. OF DECLARING BY THE BYE†.

V. OF THE TIME OF DECLARING‡.

MORRIS *v.* SMITH, T. T. 1835. Ex. 2 *C., M. & R.* 314; S. C. 4 *D. P. C.* 198.

After appearance by defendant, plaintiff may declare without waiting the eight days.

ON motion to set aside a declaration, it was stated, that the defendant had appeared to the writ of summons on the seventh day; and the plaintiff afterwards, on the same day, declared against him. It was contended that the plaintiff was bound to wait until the eight days had expired.

Per Cur.—The Uniformity of Process Act gave eight days for the benefit of the defendant; and if he appears sooner than is necessary, we think he must be considered as waiving the remainder of the time.

* Under Rule T. T., 22 Geo. 3, the last return meant the last general return. (*Wilson* v. *George*, E. T. 1826, K. B., 5 B. & C. 454).

† Formerly, after a defendant had appeared, either the plaintiff in the original action or another suitor might have declared against him for a separate and distinct cause of action, founded upon the original process and appearance, without having recourse to a new writ; (see 5 Ter. Rep. 634; 3 Ter. Rep. 629); but as the whole practice connected with the privilege of declaring by the bye was derived from and regulated by principles only applicable to terms and vacations, it would seem that this method of proceeding is done away with, and actions can only be prosecuted by writs issued in the particular cause; but even formerly, in the Exchequer, a declaration could not be filed by the bye at the suit of another plaintiff. (*Griffith* v. *Humphreys*, E. T. 1829, Ex., 3 Y. & J. 218).

‡ The 2 Will. 4, c. 39, s. 11, after reciting, that "according to present practice in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any term until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created," enacts, "That if any writ of summons, capias, or detainer, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay at the expiration of eight days from the same, or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that if the last day shall in any case happen to fall on a Sunday, Christmas-day, or any day appointed for a public feast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days, and if the last of such eight days shall happen to fall on any day between Thursday before and Wednesday after Easter-day, then and in every such case

ALTROFFE *v.* LUNN, E. T. 1829. K. B. 9 *B. & C.* 395.

Being in criminal custody does not count in the time for declaring.

A DETAINER for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment. On motion for a supersedeas as regards the present action, because the plaintiff had not proceeded pending the imprisonment—

The Court held that the plaintiff was not bound to do so, because he was not in custody at the suit of the plaintiff, but under sentence of a criminal charge.

MORTON *v.* GREY, E. T. 1829. K. B. 9 *B. & C.* 544.

On a writ against two and only one defendant served, time to declare must be obtained the same as if one defendant only.

ON motion to set aside a declaration, it appeared that a writ had been issued against A. and B.; A. however had only been served, and he had appeared. The writ had issued 28th April, 1828. But, as the plaintiff could not serve B., he did not declare until 21st October, 1829.

Per Cur.—The practice appears to be, that time in that case must be obtained in the same manner as where there is one defendant only. The proceedings are consequently irregular, and the declaration must be set aside.

VI. OF THE DECLARATION, NOT NOW THE COMMENCEMENT OF THE SUIT*.

VII. OF DECLARING AGAINST ONE DEFENDANT ON PROCESS AGAINST SEVERAL DEFENDANTS.

CALDWELL *v.* BLAKE, E. T. 1835. Ex. 2 *C., M. & R.* 249.

Writ of summons against

THE writ of summons was against two defendants, but the declaration against one only. On motion to set the declaration aside,

the Wednesday after Easter-day shall be considered as the last of such eight days; provided also, that if such writ shall be served or executed on any day between the 10th day of August and the 24th day of October in any year, special bail may be put in by the defendant on bailable process, or appearance entered, either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days; provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said 10th day of August and 24th day of October.

By Rule (Reg. Gen. 1832; 10 Bing. 153), the plaintiff must declare before the end of the term after arrest or detainer. The plaintiff cannot declare after a lapse of a year from service of the writ, or, if stayed by rule, within a year after the expiration of the rule. (*Unite* v. *Humphrey*, E. T. 1835, B. C., 3 D. P. C. 532).

The word peremptorily in a rule to declare, &c., only prevents the plaintiff from taking out rules for further time; and if he deliver the pleading required after the expiration of the rule, but before the opposite party signs judgment, that is sufficient. (*Gray* v. *Pennell*, M. T. 1831, B. C., 1 D. P. C. 120).

* Formerly, when the proceedings were by bill, the declaration was considered the commencement of the action, and the plaintiff was only allowed to shew an earlier commencement by suing out the writ for advancing the justice of the case. (*Worswick* v. *Beswick*, E. T. 1830, K. B., 10 B. & C. 696). But since the Uniformity of Process Act the writ is the commencement of the suit. (See 2 D. P. C. 93; 1 C. & M. 768).

because by the former practice mesne process could only contain the names of the defendants in that action; and that the same rule obtained since Rule M. T., 3 Will. 4—

two, declaration against one, regular*,

Per Cur.—The present declaration is quite regular. But, if another declaration be served containing the other's name, then there will be an irregularity.

BOWLES *v.* BILTON, E. T. 1832. Ex. 2 *C. & J.* 474.

ON a writ of venire against A. B. and C. D., the plaintiff declared, and gave notice of declaration, against A. B. only. On motion to set notice of declaration aside—

there being no objection on principle to such a course.

Per Cur.—There can be no objection, on principle, in plaintiff declaring against one defendant only.

EVANS *v.* WHITEHEAD, T. T. 1828. K. B. 2 *M. & Ry.* 367.

IT was stated by the affidavits that the writ was against both the defendants, and was a non-bailable process. Common bail had been put in for the defendant Whitehead, and the declaration was against him only; but the notice of declaration which had been served on him was intituled as against both defendants; namely, "Take notice, that a declaration has been filed against you." Goldby had not filed common bail, nor had the plaintiff filed it for him, according to the statute.

But the notice of declaration must not be intituled against both.

Per Lord *Tenterden*, C. J.—If the plaintiff had filed two separate declarations against these two defendants, that would clearly have been irregular under the Rule of Court referred to; but I am decidedly of opinion that a plaintiff may sue out his writ against two defendants, and declare against one only, dropping his proceedings against the other entirely. The notice of this declaration, however, is certainly bad, and the service of it must be set aside.

WILSON *v.* EDWARDS, H. T. 1825. K. B. 3 *B. & C.* 734; S. C. 5 *D. & R.* 622.

ON shewing cause against a rule nisi for setting aside a declaration, because the defendant, who alone was declared against, had been held to bail jointly with another person, it appeared, for an assault and battery committed by the defendant and the other person, and that they had been both held to bail on a Judge's order—

In tort, on bailable process against two, you may declare against one.

By the Court.—The Rule, that the plaintiff shall declare against all the persons whom he has held to bail, has not yet, by any decision, been extended to actions for torts. The principles on which actions for contracts and for torts are founded are quite different; and we think that the Rule is not applicable to actions for torts.

* But, where the affidavit of debt was against two and the declaration against one, held irregular; and after a summons taken out for setting it aside, and referred to the Court, held, that the plaintiff could only withdraw it upon payment of costs. (*Bellotti* v. *Barella*, H. T. 1836, Ex., 4 D. P. C. 719).

Before the Uniformity of Process Act, where, in an action against three, two of whom had been arrested, but the third only served with process, and no appearance entered until after a declaration filed de bene, held irregular; but the defendant having afterwards pleaded the irregularity was waived. (*Hamilton* v. *Jones*, 4 M. & P. 456). If one be arrested and the other defendant served, plaintiff cannot declare against former alone. (*Carson* v. *Dowding*, M. T. 1835, B. C., 4 D. P. C. 297).

PITT *v.* WILKS, E. T. 1831. Ex. 1 *C. & J.* 388; S. C. 1 *Tyrw.* 303.

Formerly held that plaintiff might declare jointly against several defendants, though brought into Court by different process, and there had been separate appearances*.

THE plaintiff had issued a venire against one defendant, and a quo minus against another, both writs being serviceable only. The appearances were separate, as were also the rules to declare. The plaintiff then declared against them jointly. On a rule to set the declaration aside—

Per Cur.—If in this case the writs had been of the same kind, the appearances and rules to declare would have been separate, and, there being a joint declaration, would have been irregular; but as the writ against one defendant was a quo minus, and against the other a venire, it cannot make any difference; for the effect of serviceable process is only to bring the parties into Court, and when there they may be declared against jointly.

IX. COMPELLING PLAINTIFF TO DECLARE†, AND AS TO THE CONSEQUENCES OF NOT DECLARING IN TIME. See tit. *Non pros, Judgment of.*

X. FORM OF THE DECLARATION.

(*a*) TITLE OF THE COURT‡.

RIPLING *v.* WATTS, M. T. 1835. B. C. 4 *D. P. C.* 290.

Declaration itself must be intituled; mere indorsement not sufficient.

THE declaration was not intituled in any court, but the title of the court was indorsed on the back. On motion to set it aside—

Per Littledale, J.—The rule must be absolute. The declaration should be intituled, as usual, on the face of it; the mere indorsement on the back will not do.

(*b*) OF THE TERM OR DAY WHEN FILED OR DELIVERED§.

ANON., M. T. 1830. K. B. 1 *D. P. C.* 4.

On demise of Crown in term, declaration intituled first year of the succeeding reign is proper.

THE declaration was intituled of Trinity Term, in the first year of the reign of William the Fourth, the death of George the Fourth having taken place in that term.

Littledale, J., thought the declaration properly intituled.

* But by Rule M. T., 3 Will. 4, it is ordered, that every writ of summons, capias, and detainer, shall contain the names of all the defendants, if more than one, in the action; and shall not contain the name or names of any defendant or defendants in more actions than one.

† If the plaintiff does not declare in time, he may be ruled to declare; and the declaration may be demanded, and he may be ultimately non-prossed. By Rule H. T., 2 Will. 4, it is ordered, that it shall not be necessary for a defendant in any case to give a rule to declare, except upon removal from inferior courts; and by the same rule, where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is issued.

‡ By Rule M. T., 3 Will. 4, it is ordered, "that every declaration shall be intituled in the proper court;" as in K. B., C. P., and Exchequer.

§ Formerly the declaration was intituled of the term; but now, by Rule M. T., 3 Will. 4, it is ordered, "that every declaration shall in future be intituled of the day of the month and year on which it is filed or delivered." As to declarations in ejectment, see post, tit. *Ejectment.*

(*c*) As to the venue*.

Duncan *v.* Passenger, E. T. 1832. C. P. 8 *Bing.* 355.

The declaration was "Middlesex, to wit," in the margin; which, after mentioning a certain day, specified the facts "then and there." On demurrer—

Allegation "then and there," supported by reference to venue in margin.

The Court held that the words "then and there" must apply to the county named in the margin, and was therefore a sufficient allegation of place.

Farmer *v.* Champneys, 1 *C., M. & R.* 369; S. C. 4 *Tyrw.* 859. —S.P. Harper *v.* Chumneys, 2 *D. P. C.* 680.—S.P. Fisher *v.* Snow, 3 *D. P. C.* 27; Townsend *v.* Gurney, 1 *C., M. & R.* 590; S. C. 5 *Tyrw.* 214; S. C. 3 *D. P. C.* 168.

Special demurrer for inserting venue in the declaration.

A declaration, stating venue contrary to Rule H. T., 4 Will. 4, is no ground of demurrer.

Per Cur.—The introduction of venue contrary to Rule H. T., 4 Will. 4, is certainly no ground of demurrer. It may be a reason for applying to a Judge at chambers to have it struck out, but clearly nothing more.

(*d*) As to the description of the method by which the defendant has been brought into court†.

Hunt *v.* Pitt, H. T. 1833. Ex. 1 *D. P. C.* 659.

The declaration did not allege that the plaintiff was a debtor to the king, or was less able to satisfy the debts which he owed him. On special demurrer, the case of *Nickling* v. *Dickens*, infra, was relied on.

Since the Uniformity of Process Act, the omission of the quo minus in the Exchequer is no ground of demurrer.

Sed per Cur.—That decision was before the 2 Will. 4, c. 39; this is subsequent to it, and commenced now by writ of summons. Formerly it was a proceeding by quo minus.

Nickling *v.* Dickens, T. T. 1832. Ex. 2 *C. & J.* 622.

A declaration in the Exchequer omitted to conclude with the quo minus sufficiens &c. On special demurrer—

Aliter, before the Uniformity of Process Act.

The Court held the declaration insufficient.

Alderson *v.* Johnson, M. T. 1836. Ex. 2 *M. & W.* 70; S. C. 5 *D. P. C.* 294.

Special demurrer to a declaration, on the ground that it was framed on the old form, alleging that the plaintiff was a debtor to the king, &c.

And now its insertion is mere surplusage.

Sed per Cur.—This is a mere fiction, and may be rejected as surplusage: at all events it is no ground of demurrer.

* By Rule H. T., 4 Will. 4, the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration. Provided that, in cases where local description is now required, such local description shall be given.

† See forms given by Rule M. T., 3 Will. 4.

(*e*) Statement of the form of action in accordance with the writ*.

Anderson *v.* Thomas, H. T. 1833. C. P. 9 *Bing.* 678.

The form of action need not be stated at the commencement of the declaration.

The declaration misdirected the form of action at the commencement. On demurrer—

The Court held, that it was no ground of demurrer to omit to state the nature of the action at the commencement of the declaration pursuant to Rule M. T., 1654.

Thompson *v.* Dicas, T. T. 1830. Ex. 2 *D. P. C.* 93; S. C. 3 *Tyrw.* 873; S. C. 1 *C. & M.* 768.

But if stated must, since Uniformity of Process Act, correspond with the writ.

The writ of summons served on the defendant being in "trespass on the case;" and the plaintiff having declared in trespass, a rule to set aside the declaration with costs for irregularity was obtained.

Bayley, B.—Before the Uniformity of Process Act the writ was only process to bring the party into Court, and the plaintiff might declare in any form of action without reference to the writ. Since that act it is a commencement of the action, and according to the form given in the schedule must shew the nature of the action, and the declaration must pursue the form specified in the writ.

Davis *v.* Jones, M. T. 1834. Ex. 1 *C., M. & R.* 582; S. C. 5 *Tyrw.* 182.

A variance between the writ and the particulars delivered with the notice of declaration, is no ground for setting it aside.

The writ of summons was expressed to be in an action of trespass on the case, and the notice of declaration and particulars of demand when served disclosed a cause of action either in assumpsit or debt. On motion to set aside the writ—

Per Cur.—The application is premature: the defendant should have waited until after the declaration is filed. A declaration may be yet filed in accordance with the writ.

Du Prè *v.* Langridge, T. T. 1834. B. C. 2 *D. P. C.* 584.

Date of writ need not be stated.

On motion to set aside a declaration on the ground of the date of the writ being omitted at its commencement—

Per Patteson, J.—That form in Rule H. T., 4 Will. 4, is only applicable to the issue and not the declaration. It was never intended that any alteration should be made in the form of the declaration.

* Where the writ was in debt, and the declaration partly in debt and partly in assumpsit, the Court refused to set aside proceedings as irregular, leaving the defendant to demur. (*Rotton* v. *Jeffery*, E. T. 1834, Ex., 2 D. P. C. 637).

Where the writ was to answer "on a special action," and the declaration on promises:—Held, that the latter was not irregular, but the motion should have been to set aside the writ. (*Moore* v. *Archer*, T. T. 1835, Ex., 4 D. P. C. 214).

A defendant seeking to take advantage of an irregularity by the variance of the declaration from the writ, is bound to apply within four days from the service of the notice of declaration, whether in term or vacation; and it is immaterial that any one of these four days falls within term. In reckoning, Sunday is to be counted as one of the four days. (*Hinton* v. *Stevens*, M. T. 1835, B. C., 4 D. P. C. 283).

(*f*) Of the description of the character in which the parties are designated in the writ.

Knowles *v.* Johnson, E. T. 1834. Ex. 2 *D. P. C.* 653.

Motion to set aside the writ and declaration, because the writ was general and the declaration special as assignee.

Under a general writ the plaintiff may declare in a special character.

Per Cur.—There is no incongruity: the declaration shews the character in which the plaintiff is suing. It cannot be assumed that the parties are different.

Ferguson *v.* Mitchell, M. T. 1835. Ex. 2 *C., M. & R.* 607; 1 *Tyrw. & Gr.* 179; S. C. 4 *D. P. C.* 513.

The declaration in debt by the assignees of A. B. C., an insolvent debtor, alleged that the defendant on &c. was indebted to the said A. B. C., before he filed his petition and executed the assignment, in the sum of £—, for goods sold and delivered by the said A. B. C. before he became insolvent; and alleged that the money was to have been paid to the said A. B. C. before he became insolvent, and that by reason of the same being unpaid an action had accrued to the plaintiffs, his assignees. On special demurrer—

Description of the plaintiffs as assignees of an insolvent sufficient if it can be clearly inferred.

The Court held the declaration sufficient.

(*g*) Of the word "whereas."

Shepherd *v.* Gosden, E. T. 1840. B. C. 8 *D. P. C.* 475.

A declaration on a bill of exchange at the commencement omitted the word "Whereas." On demurrer—

The omission of the word "whereas" is not a ground of demurrer.

Williams, J., said—I think the omission of the word "whereas" no ground of demurrer. It seems to me that the allegation in the declaration is as good in its present form, by way of recital; in fact, it is a little stronger without it.

(*h*) Statement of time*.

(*i*) Statement of the promise and breach.

Turner *v.* Denman, E. T. 1834. Ex. 4 *Tyrw.* 313.

Declaration. The first count on a bill against the acceptor stating a promise to pay, without any breach; 2nd, and subsequent counts for money lent, &c.; and an account stated, and promises alleged as to these counts. General breach, that the defendant had disregarded his promises, and had not paid the several monies to the plaintiff.

Count on a bill and money counts, general breach is sufficient.

The Court held the declaration sufficient.

Harding *v.* Hibel, E. T. 1834. Ex. 4 *Tyrw.* 314.

The declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any

Unless there be two counts,

* The description of time in the intituling of the declaration should not be "in the year" only, but "in the year of our Lord." (*Holland* v. *Tealdi*, H. T. 1840, B. C., 8 D. P. C. 320).

and only one promise, stating a promise to pay the last-mentioned monies is bad.

promise to pay it, and then, under a "whereas," also proceeds to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c.; concluding, that the defendant had promised to pay the said last-mentioned several monies respectively to the plaintiff on request.

Held bad on demurrer, for want of a promise in the first count, which was not referred to by the words last mentioned in the second count.

(*k*) Indorsement of time to plead.

Solomonson *v.* Parker, M. T. 1833. B. C. 2 *D. P. C.* 405.

If eight days be improperly indorsed to plead, judgment cannot be signed till expiration of them.

In this case the declaration was delivered indorsed to plead within eight days; the defendant only being entitled to four days' time for pleading. The declaration was not delivered until the 6th August, and consequently the eight days would not expire until after the 10th of that month. The plaintiff, however, signed judgment for want of a plea on the 30th of October.

Littledale, J.—As the plaintiff thought proper to give the defendant eight days for the purpose of pleading, he is entitled to that length of time, and the plaintiff cannot sign judgment until they have expired.

Silverside *v.* Tappen, H. T. 1840. 7 *Scott*, 480.

The time for pleading need not be indorsed on the declaration when filed.

Rule for setting aside a declaration which had been filed for irregularity. The irregularity complained of was, that no notice of time to plead had been indorsed thereon.

Per Cur.—That which is complained of here is not only grown into a rule of practice, but the officers certify that when a declaration is filed an indorsement of the time to plead is unnecessary, as the time is contained in the notice of the declaration being filed; the rule should be discharged with costs.

XI. JOINDER OF COUNTS.

Reg. Gen. H. T. 1833. *Q. B., C. P., and Ex.*

Rule H. T., 4 Will. 4, directs what counts may or may not be joined.

By Rule H. T., 4 Will. 4, it is ordered, that several counts shall not be allowed unless a distinct matter of complaint is intended to be established in respect of each; therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. Counts founded upon the same contract, described in one as a contract without a condition and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract. So, counts for not giving or delivering or accepting a bill of exchange in payment according to the contract of sale for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So, counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed. But

counts upon a bill or note, and for the consideration of the bill or note, or goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts, and such counts are to be allowed. Two counts on the same policy of insurance are not to be allowed; but a count upon a policy of insurance and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed. Two counts on the same charter-party are not to be allowed; but a count for freight upon a charter-party, and for freight pro ratâ itineris, upon contract implied by law are to be allowed. Counts upon a demise, and for use and occupation of the same land, are not to be allowed. In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed. In like actions for non-feasance, several counts founded on varied statements of the same duty are not to be allowed. Several counts on trespass for acts committed at the same time and place are not to be allowed. Where several debts are alleged on indebitatus assumpsit to be one in respect of several matters, ex. gr., for wages, work and labour as a hired servant; work and labour generally; goods sold and delivered; goods bargained and sold; money lent; money paid; money had and received; and the like,—the statement of each debt is to be considered as amounting to a several count within the meaning of the Rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts. Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts*.

WEETON *v.* WOODCOCK, E. T. 1839. Ex. 5 *M. & W.* 143; S. C. 7 *D. P. C.* 384.

Case, for disannexing a steam-engine from a factory, may be joined with a count in trover.

CASE. The first count of the declaration was for disannexing and removing from premises a certain steam-engine boiler, and converting and disposing of the same to the defendant's use. The second was in trover for a conversion of the same steam-engine boiler. Upon the objection that these two counts could not be allowed since the new rules, as they did not shew a distinct subject-matter of complaint in each, the Court suggested that that part of the first count which alleged a conversion should be struck out.

THORNTON *v.* WHITEHEAD, H. T. 1836. Ex. 1 *M. & W.* 14; S. C. 1 *Tyrw. & Gr.* 313; S. C. 4 *D. P. C.* 747.

Debt for double rent under 11 Geo. 2, c. 19, may be joined with counts for use and occupation.

THE declaration in debt contained two counts: one on the 11 Geo. 2, c. 19, for the penalty of the double rent of the premises by a landlord against his tenant, for holding over after a notice to quit, given by the latter. The other was for use and occupation of the same premises; and the particulars claimed 8*l.* for rent. On an application that one of these counts should be struck out, according to

* An account stated may be joined with other money counts. (*Mee* v. *Tomlinson*, M. T. 1835, K. B., 5 N. & M. 624; abridged post, tit. *Plea*).

Rule Hilary Term, 4 Will. 4, *Lawrence* v. *Stephens*, 3 D. P. C. 777, was relied on: there were two counts, one in debt for not setting out tithes, and the other upon a composition, and this Court ordered one of them to be struck out.

Alderson, B.—These are statements of two separate demands; though the plaintiff cannot recover on both, I doubt as to the propriety of the decision referred to. The double rent could not be recovered on the count for use and occupation.

JENKINS *v.* TRELON, H. T. 1836. Ex. 1 *M. & W.* 16; S. C. 1 *Tyrw. & Gr.* 316; S. C. 4 *D. P. C.* 690.

Different statements of the same cause of action cannot be joined in one declaration*.

THIS was an action for tolls by the lessee of a corporation, which was the subject of discussion in *Jenkins* v. *Harvey*, 1 C., M. & R. 877. The present declaration contained two counts: one claiming the toll as a metage toll, due in respect of the office of meter; the other claiming it as a port duty. Rule, to strike out one of these counts under the Rule Hilary Term, 4 Will. 4, No. 5, on the ground that the same subject-matter was sought to be recovered in each.

Lord *Abinger*, C. B.—If I thought we had a discretion, I should be disposed to allow both counts to stand. But I think the Rule is peremptory on us, and that this rule must be made absolute. The same thing is here claimed on different contracts, but by the same evidence.

WEETON *v.* WOODCOCK, M. T. 1839. 7 *D. P. C.* 853; S. C. 5 *M. & W.* 587.

A count, that the defendants "wrongfully, and without the consent of the plaintiffs," did &c., is in trespass, and cannot be joined with trover.

THE first count of the declaration stated a demise by the plaintiffs to T. of certain premises, and set out a covenant to keep up a steam-engine boiler, and to deliver up the premises in good order, with every thing upon them, at the end of the term; it then alleged the determination of the term, and stated, as a breach, that the defendants wrongfully, and without the consent of the plaintiffs, disannexed the boiler, by means whereof the plaintiffs' estate and interest in the premises were injured.

The Court held that this was substantially a count in trespass, and was improperly joined with a count in trover.

XII. STRIKING OUT COUNTS.

ROY *v.* BRISTOWE, H. T. 1837. Ex. 2 *M. & W.* 241.

The rule for striking out counts must be drawn up on reading the declaration, or an

THE declaration contained two counts, varying the same cause of action. On a rule to strike out one of the counts, on the ground that the declaration was contrary to Rule H. T., 4 Will. 4, it was contended that the rule could not be supported. It was simply to strike out one of the counts, and was not drawn up on reading the

* The first count of a declaration stated, that E. J. was possessed of shares in a railway, and that defendant promised plaintiff that he was authorized by E. J. to sell the shares, whereas he was not so authorized. The second count stated, that defendant bargained with the plaintiff to sell him the said shares, and promised to transfer them within a reasonable time:—Held, that both counts are not allowable. (*Roy* v. *Bristow*, H. T. 1837, Ex., 5 D. P. C. 452).

declaration, or any affidavit stating the nature or effect of the counts. affidavit stating its contents.

The Court held it insufficient.

CHOLMONDELEY *v.* PAYNE, E. T. 1837. C. P. 5 *D. P. C.* 638; S. C. 3 *Bing. N. S.* 708.

THE declaration contained one count, on an undertaking by the defendants to be responsible for the proceeds of a sale with the auctioneer, and another by themselves, without the auctioneer. Unless two counts appear distinct, one must be struck out.

The Court held, that the subject-matter of the two counts not appearing to be distinct, one must be struck out, unless a Judge at chambers might allow it to stand conditionally, under Reg. Gen. 1 Will. 4.

WARD *v.* GRAYSTOCK, H. T. 1836. 4 *D. P. C.* 717.

ON motion to strike out one of two counts in a declaration, as being in violation of the late Rules of pleading— Applications to strike out should be made in first instance at chambers;

Parke, B.—The counts certainly appear to me to be founded on the same cause of action, but varied in the mode of stating it. Such applications as these ought to be made to a Judge at chambers in the first instance; and if a doubt arises, the parties may come to the Court.

DOE *d.* OVERSEERS OF LLANDESILIO *v.* ROE, T. T. 1835. Ex. 4 *D. P. C.* 222.

RULE to strike out counts. The declaration was in ejectment, on the demise of the churchwardens and overseers of a parish, to recover parish property, and contained two sets of counts, one specifying the names of the individuals, and the other not. but where they involve a point of law or construction of statute, motion should be made to the Court.

The Court ordered one set to be struck out, and said that a motion for that purpose, involving a point of law and construction of an act of Parliament, was properly brought before the full Court.

TOMLINSON *v.* NANNY, E. T. 1833. Ex. 2 *D. P. C.* 17.

DECLARATION contained counts on promises to the testator, and also a count on an account stated by the defendants with the plaintiffs as executors, and a promise to pay to them as executors. The defendant pleaded the general issue and the Statute of Limitations, and paid a sum of money into Court generally. A summons had been taken out before the Judge at the assizes to strike out the last count, where the promise was laid to the plaintiffs, as executors; but the learned Judge refused the order. It is too late to apply to strike out counts after the cause has been taken down to trial;

Lord *Lyndhurst*, C. B.—You made your election when you drew the declaration. By introducing that count, you probably alarmed the defendant very much; it was too late, therefore, to apply at the assizes, and you are too late now. The attorney ought to have known what counts the declaration contained.

THOMAS *v.* JACKSON, T. T. 1824. C. P. 2 *Bing.* 453.

THIS was an application to strike out unnecessary counts after they were engrossed on the record. or even after the record is entered.

The Court held that it was too late to make the application.

FRASER *v.* SHAW, M. T. 1825. K. B. 6 *D. & R.* 384.

Where the plaintiff opposed the striking out counts, the Court ordered a reference to the Master for that purpose, or that they be struck out, with costs.

THE declaration contained four counts for work and labour, though two of them were special. On a rule to shew cause why they should not be referred to the Master to strike out such of the counts as were unnecessary, the application was opposed; but—

The Court thought the counts unnecessary, and said the plaintiff must make his election either to strike out two of the counts and pay the costs, or let the matter be referred to the Master.

XIII. OF DELIVERING OR FILING*.

BAYLEY *v.* THOMPSON, E. T. 1834. Ex. 2 *D. P. C.* 655.

A declaration, purporting to bear an attorney's name who is not one in fact, is not a nullity.

THE declaration was delivered in the name of a person as the attorney, but who in fact was not so. The defendant signed judgment non pros. On motion to set aside the judgment as irregular—

Per Cur.—The judgment ought not to have been signed. The declaration was not a nullity. The defendant should have moved to stay proceedings until a proper attorney was appointed.

XIV. OF THE NOTICE OF DECLARATION†.

KING *v.* SKIFFINGTON, H. T. 1833. Ex. 1 *D. P. C.* 686; S. C. 1 *C. & M.* 363.

The notice of declaration must agree with the writ of summons.

WRIT of summons being to answer the plaintiff in an action of trespass on the case, followed by a declaration in assumpsit—

Per Cur.—The act has given a form of writ which particularly specifies the species of action, as on promises, or in debt, &c., as the case may be. When you say in case, you may mean one of two forms of action, and therefore do not specify the form of action with sufficient precision; the forms must be adhered to.

* When special bail is put in or an appearance entered, the declaration must be delivered to the defendant's attorney; when no appearance, the declaration must be filed, and notice given. Where the plaintiff's declaration is delivered on the day after that on which it bears date, contrary to 1 Reg. Gen. H. T., 4 Will. 4 (Pleading Rules), it is an irregularity which is waived by delaying to come to the Court from the 20th of October to the 9th of November. (*Newnham* v. *Hanny*, M. T. 1836, B. C., 5 D. P. C. 259). The irregularity of a declaration filed conditionally, the notice being of its being filed absolutely:—Held to be waived by taking it out of the office, the defendant having an opportunity of seeing how it was indorsed before he took it out. (*Gilbert* v. *Kirkland*, H. T. 1832, B. C., 1 D. P. C. 153). Formerly the Rule of H. T., 60 Geo. 3, enabling the plaintiff to deliver or file his declaration two days exclusively before the end of the term, instead of four, left the time of the return as it was before, and did not therefore extend to the filing a declaration, where the writ was not returnable before the last returns of the term. (*Nock* v. *Southall*, 1 M'Clel. & Y. 659).

† By Rule, H. T., 4 Will. 4, the eight days' previous service of process must in all the Courts have expired before giving notice of declaration.

COOKE *v.* JOHNSON, M. T. 1831. C. P. 1 *D. P. C.* 247; S. C. 1 *M. & Scott,* 115.

IN this case a rule was obtained to set aside the notice of declaration and all subsequent proceedings for irregularity, with costs, the notice of declaration being in case, while the declaration, which was filed conditionally, was in debt.

Notice of declaration in case when filed in debt irregular.

Per Cur.—The cause of action must in all cases be expressed in the notice of declaration.—Rule absolute.

SMITH *v.* CLARKE, M. T. 1833. Ex. 2 *D. P. C.* 218.

ON shewing cause against a rule for setting aside the interlocutory judgment which had been signed in this action, with costs, for irregularity. The notice of declaration was headed in the King's Bench, and gave notice of a declaration filed in the office of Pleas. It was contended, that the defendant could not be misled by it, and that he should have moved to set aside the notice, and not wait till judgment was signed. The notice was given on 30th October, and the motion was made on the 10th November.

When notice improperly intituled application should be to set that aside, and not to set aside interlocutory judgment.

Lord *Lyndhurst,* C. B.—I think they were bound to move to set aside the notice.

SAMS *v.* CULHAM, H. T. 1829. K. B. 9 *B. & C.* 370.

RULE nisi to set aside the proceedings for irregularity, on the ground that the notice of declaration did not state the nature of the action. No appearance had been entered or common bail filed for the defendants.

The notice of declaration must state the nature of the action and the mode of appearance.

Per Cur.—The notice should state the nature of the action, and the mode of appearance, if entered.

POPE *v.* MANN, T. T. 1837. Ex. 2 *M. & W.* 881.

NOTICE of declaration was given, and demand of plea made on the 27th of April; judgment signed for want of a plea on the 2nd May. There was a rule to plead before declaration.

Notice of declaration should be given before rule to plead.

Per Cur.—A rule to plead before declaration is irregular, but the irregularity is waived by the defendant taking out a summons for time to plead.

AITMAN *v.* CONWAY, M. T. 1837. Ex. 6 *D. P. C.* 76; S. C. 3 *M. & W.* 71.

RULE to plead in this cause was delivered at the office before three o'clock on the 26th of October, and notice of declaration given at six o'clock of the same day to set aside judgment signed in the cause, for irregularity.

But a rule to plead may be entered before notice of declaration, if on the same day.

Lord *Abinger,* C. B.—We have received a certificate from Master Le Blanc, that there is no irregularity if both are on the same day.

NOCK *v.* SOUTHALL, M. T. 1824. Ex. 1 *M'Clell.* 659.

NOTICE of declaration was served on the return day by a person going away, but who returned a few minutes after service of the writ.

Formerly process and notice of declaration might be served on the same day.

On motion to set the proceedings aside the Court held there was no irregularity.

ROOKE *v.* SHERWOOD, M. T. 1835. Ex. 4 *D. P. C.* 363.

Notice of declaration may be given in the country, whatever the distance, on the day it was intended to be filed.

THE notice of declaration filed on the 4th was given to the defendant, being at 150 miles' distance, on the same day.

The Court held the notice regular, although at the time of serving the notice it could not be known whether the declaration was filed or not.

HYDE *v.* WOMBWELL, M. T. 1830. C. P. 12 *Moore*, 85.

A notice of declaration, left where a traveller sometimes calls, is insufficient.

ON motion to set aside a judgment, it appeared that the defendant, a travelling person, on being served with process, informed the attorney that he should be at —— on a certain day, at which place the notice of declaration was left; but the party serving it was informed at the time that the defendant did not reside, but only occasionally called there.

The Court held that the service of such notice of declaration was insufficient; and a judgment signed for irregularity set aside on terms of appearing.

XV. OF STICKING UP IN THE OFFICE THE DECLARATION OR NOTICE THEREOF.

BRIDGER *v.* AUSTIN, E. T. 1832. C. P. 1 *D. P. C.* 272; S. C. 1 *M. & Scott*, 520.

If the defendant's residence be unknown, the rule for affixing the notice in the office is absolute in the first instance*.

ON motion, that sticking up notice of declaration might be good service thereof upon the defendant, under Rule H. T., 2 Will. 4, by which it is ordered, "That where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court"—

Per Cur.—The rule may be absolute in the first instance, where the defendant's residence is unknown.

XVI. OF SETTING ASIDE THE DECLARATION†.

LINDSAY *v.* WELLS, E. T. 1837. C. P. 5 *D. P. C.* 618; S. C. 3 *Bing. N. S.* 777.

A declaration, containing an

THE irregularity complained of was, that the plaintiff had styled himself Henry H. Lindsay, whereas he was bound to state his second

* But some attempt must have been made to find the defendant. (*Fry* v. *Rogers*, M. T. 1833, B. C., 2 D. P. C. 412). The mere fact of his being an itinerant performer, and address unknown, is no ground for sticking up the declaration in the prothonotary's office. (*Kemp* v. *Powell*, 8 Moore, 273). When the Court allow notice of declaration to be stuck up in the Master's office, they will not, on the same rule, direct the service of all future notices and rules to be made in the same way. (*Layton* v. *Mason*, H. T. 1838, B. C., 6 D. P. C. 275).

† Where the affidavit of the defendant, on motion to set aside the service of declaration, simply stated that he had not been served, without going on to swear that the process never came to his knowledge, the rule was refused. (*Giles* v. *Hemming*, H. T. 1837, B. C., 6 D. P. C. 325). The Court refused to set aside a judgment on an alleged defect of service of notice of declaration, where the circumstances all tended to shew that it had reached the defendant. (*Rolfe* v. *Brown*, E. T. 1835, C. P., 3 D. P. C. 628).

name at full length, and give the defendant that degree of certainty and knowledge which were necessary to his defence.

initial letter only of the plaintiff's name, is no ground for setting it aside.

The Court were of opinion that there was no ground for the objection, and discharged the rule, with costs, giving the defendant a week's time to plead.

GARNER *v.* WELLER, T. T. 1827. C. P. 11 *Moore*, 457.

THE Court refused to set aside a declaration on the ground of a variance between the writ and declaration, the defendant being called John in the former and James in the latter.

Nor a variance as to the Christian name between writ and declaration,

---

HOBSON *v.* WADSWORTH, T. T. 1840. B. C. 8 *D. P. C.* 601.

THIS was an application to set aside the declaration and notice, on the ground of a variance between them and the writ. The variance was in the Christian names of the defendant. In the latter he was described wrongly as George B. Wadsworth; in the two former this was set right, and he was described as Godfrey Bingley Wadsworth, sued as George B. Wadsworth.

if corrected afterwards by the plaintiff.

Coleridge, J.—The plaintiff in substance corrected the error; and if he had neglected to correct his error, the defendant could not have pleaded the misnomer in abatement since the 3 & 4 Will. 4, c. 42, s. 11. The rule refused.

HORNE *v.* TOOK, H. T. 1834. C. P. 4 *M. & Scott*, 183.

IN this case the Court were of opinion that it was no ground for setting aside a declaration that it had been delivered in defiance of an injunction of a court of equity, restraining the plaintiff from proceeding at law.

Delivery of declaration after injunction by a court of equity no ground for setting it aside.

ROBINSON *v.* EVRINGTON, M. T. 1840. B. C. 9 *D. P. C.* 107.

ON motion to set aside a declaration, and all subsequent proceedings, on the ground of irregularity. The writ had been issued, and described the action to be an action on promises. The declaration, which was filed, described the action as on promises; but the notice of declaration by mistake described the action to be in debt. The only objection, therefore, which could be sustained was to the notice of declaration.

If the notice of declaration vary from the writ, the motion may be to set aside the declaration.

Patteson, J.—I think the rule does not ask too much, as the defendant has a right to give credit to the plaintiff for telling truth in his notice. The present rule must therefore be made absolute.

BEESTON *v.* BECKETT, H. T. 1829. K. B. 4 *M. & Ry.* 100.

A RULE nisi, to set aside a declaration for irregularity, was obtained on the 24th January, but not served until late in the evening of the 26th; and the following morning an offer had been made, by letter, to pay the costs of the irregularity, and requesting the amount, of which no notice was taken. On making the rule absolute—

After an offer to pay the costs of an irregularity on a declaration, the defendant must pay costs incurred since the offer.

Per Cur.—We can only make the rule absolute on the terms of payment, by the defendant, of all costs incurred subsequently to the offer.

XVII. IN INFERIOR COURTS. See also tit. *Courts.*

DOD *v.* GRANT, H. T. 1836. K. B. 6 *N. & M.* 70.

Old form of declaring to be observed in inferior courts.

THE declaration commenced thus: "Middlesex, to wit. Charles Dod, plaintiff, complains of James Grant, being in the custody of the marshal of the Marshalsea of our lord the now King, before the King himself," &c. Special demurrer, shewing for cause that, in the beginning of the declaration, the plaintiff has not followed the rules prescribed by the Court; for it is not stated therein that the defendant has been summoned to answer the plaintiff, or that he has been arrested, or that he is detained in custody at the suit of the plaintiff; and that the commencement is in the same form as used before the Uniformity of Process Act. Joinder in demurrer.

The Court held that actions commenced in inferior courts, and removed by habeas corpus, are not within the Uniformity of Process Act, or Rule M. T., 3 Will. 4; and therefore in such cases the plaintiff may still declare against the defendant in the old form. Judgment for plaintiff.

XVIII. WHERE THE CAUSE HAS BEEN REMOVED*. See also tits. *Certiorari—Habeas Corpus—Replevin.*

De Contumace Capiendo†

REGINA *v.* THOROGOOD, E. T. 1840. Q. B. 3 *P. & D.* 629.

Under the 53 Geo. 3, the significavit need not state it was issued within ten days after the party was in contempt; nor need the writ state the party's addition; and, if in an ecclesiastical suit for church-rates, need not allege the amount to exceed 10*l.*

ON a rule to shew cause why a writ de contumace capiendo should not be set aside—

The Court held, 1st, that it was no objection to the significavit, under the 53 Geo. 3, c. 127, that it did not state on the face of it that it was issued within ten days of the contumacy, as is required by section 1, as no such statement appears in the form given in the schedule; 2nd, that the writ de contumace capiendo is not void on the ground that it contains no addition of the defendant; and 3rdly, that it was no objection to the form of the proceedings in the Ecclesiastical Court, "in a matter of the subtraction of church-rates," that it did not appear on the face of it what the amount of the rate demanded was, or that the "validity" of the rate was in question, though the act gives jurisdiction to a justice, where the sum is under 10*l.*, and the validity of the rate not in dispute; because, as, before the passing of the above act, the Ecclesiastical Court had jurisdiction in all matters of church-rates, it is for the defendant to shew that his case is within the exception.

* By Rule H. T., 2 Will. 4, where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which it is returned.

† The Court of King's Bench, it seems, will not grant a habeas corpus to remove a defendant out of custody on a writ de contumace capiendo, for the purpose of doing penance before the Ecclesiastical Court, although the Lord Chancellor will. (*Strong, Ex parte*, M. T. 1836, B. C., 5 D. P. C. 213).

REGINA *v.* JONES, M. T. 1839. Q. B. 10 *A. & E.* 576.

The significavit of contumacy by the surrogate, in a suit before him, is irregular.

IN this case the Court held, that the surrogate of the bishop's official principal was not the proper party to signify the contumacy of a defendant in a suit before him, as Judge of the Consistory Court; and this both before and after statute 55 Geo. 3, c. 127: and where the defendant is taken under a de contumace capiendo issued upon such certificate, the Court will discharge him out of custody.

REGINA *v.* RICKETTS, M. T. 1838. Q. B. 1 *P. & D.* 150.

The interval of a term between the return of the de contumace and the capias cum proclamatione, renders the latter irregular.

THE writ of capias cum proclamatione tested 24th May, 1828, recited that a writ de contumace capiendo had issued, returnable January 11th, to take one A. B., and that the sheriff had returned that he was not found within his bailiwick; and it directed the sheriff to take the said A. B., and if he should not be found within his bailiwick, to cause proclamation to be made for him to surrender within six days; but the first writ was not delivered to the sheriff until he was out of office.

The Court held that the writ of capias was void; for if it was a continuance of the writ de contumace capiendo, the interval of the term was a discontinuance; and if it might have been issued when the latter was returned in point of fact by the sheriff, still nothing was shewn on the face of the writ to explain the delay; and it appeared in fact that the sheriff had not power to act under it.

REX *v.* RICKETTS, E. T. 1837. K. B. 1 *N. & P.* 680.

The writ should be directed to the sheriff of the county of which the party is described in the significavit.

A WRIT de contumace capiendo was directed to the sheriff of Herefordshire, and commanded him to take A. B., of D., in the county of Radnor. On motion to quash the writ, on the ground that it was directed to the sheriff of the wrong county—

Per Cur.—The writ must be quashed, because it is directed to the sheriff of Herefordshire instead of the sheriff of Radnor, as in the significavit.

REX *v.* HEWITT, T. T. 1837. K. B. 5 *D. P. C.* 646; S. C. 1 *N. & P.* 689.

To describe the defendant as "now or heretofore of the parish of A., in the county of &c.," is bad.

THE writ de contumace capiendo was directed to the sheriff of N., commanding him to take one A. B., described as "now or heretofore of Crofton Hall, in the parish of A., in the county of Kent." The writ was filed and delivered to the sheriff. On motion to quash the writ—

The Court made the rule absolute, without compelling the defendant to sue out a habeas corpus.

KINGTON *v.* HACK, H. T. 1838. Q. B. 3 *N. & P.* 3.

A writ de contumace capiendo will not be quashed on a mere suggestion that the sentence in the spiritual court was invalid in part.

IN a suit for defamation a writ de contumace capiendo issued, charging a contempt in non-performance of a penance enjoined by the Spiritual Court, and also in the non-payment of 25*l.* for costs. On motion to set aside the writ, on the ground that the sentence enjoining the penance was erroneous—

Per Cur.—Supposing any one ground of contempt set forth in the writ be valid, the writ cannot be set aside. Now, it appears that the costs are awarded in a precise sum, and the Court had power to

award them. Whatever objection, therefore, may be urged against the penance pronounced by the Court, the defendant is in contempt for the non-payment of those costs.

Decree in Equity*.

Deed.

I. RELATIVE TO WHAT CONTRACTS MUST BE BY DEED, p. 376.

II. RELATIVE TO THE DIFFERENCE BETWEEN DEEDS AND PAROL CONTRACTS, p. 376.

III. RELATIVE TO THE DIFFERENCE BETWEEN DEEDS POLL AND INDENTURES, p. 376.

IV. RELATIVE TO THE DIFFERENT SPECIES OF DEEDS.

(*a*) As to real property.

1. *Connected with its Conveyance.*

As to Conveyances at Common Law.

1. *Original Conveyances.*

1. *Feoffments.* See tit. *Feoffment.*
2. *Gifts.* See tit. *Gift.*
3. *Leases.* See tit. *Lease.*
4. *Partition.* See tit. *Partition.*

2. *Derivative Conveyances.*

1. *Releases.* See tit. *Release.*
2. *Confirmations.* See tit. *Lease.*
3. *Surrender.* See tit. *Surrender.*
4. *Assignments.* See tits. *Copyhold—Covenant—Lease—Mortgage.*

2. *Connected with charging or encumbering it.*

1.—*Bonds.* See tit. *Bond.*

2.—*Mortgages.* See tit. *Mortgage.*

3.—*Recognizances.* See tit. *Recognizance.*

(*b*) Connected with personal property.

1. *Annuity.* See tit. *Annuity.*
2. *Apprenticeship.* See tit. *Apprentice.*
3. *Arbitration.* See tit. *Arbitration.*

* When an action will lie upon, see *Biddell* v. *Dowse*, 9 D. & R. 413.

IV. RELATIVE TO THE DIFFERENT SPECIES OF DEEDS —(*continued*).

4. *Articles of Clerkship.* See tits. *Apprentice—Attorney.*

5. *Deeds of Assignment of Personal Property.* See tits.

Advowson,	*Chose in Action,*
Annuity,	*Copyright,*
Apprentice,	*Dower,*
Attorney,	*Lading, Bill of,*
Bills and Notes,	*Rent,*
Bond,	*Tithes.*

6. *Deeds of Charter-party.* See tit. *Charter-party.*

7. *Deeds of Composition with Creditors.* See tit. *Composition with Creditors.*

8. *Deeds of Insurance.* See tit. *Insurance.*

9. *Deeds of Marriage Settlement.* See tit. *Marriage.*

10. *Money Bonds.* See tit. *Bond.*

11. *Deeds of Sale.* See tit. *Vendor and Purchaser.*

12. *Deeds of Warranty.* See tit. *Warranty.*

(*c*) CONNECTED WITH OTHER PURPOSES.

1. *Bail Bonds.* See tit. *Bail.*

2. *Replevin Bond.* See tit. *Replevin.*

(*d*) CONNECTED WITH PARTICULAR PERSONS.

1. *Corporations.* See tit. *Corporation.*

2. *Debtor and Creditor.* See tit. *Composition with Creditors.*

3. *Partners.* See tit. *Partner.*

4. *Principal and Agent.* See tit. *Principal and Agent.*

V. GENERAL REQUISITES OF DEEDS.

(*a*) PARTIES TO CONTRACT, p. 376.

(*b*) AS TO THE CONSIDERATION.

1.—*In general,* p. 376.

2.—*In particular—Illegality of.*

1. *By Common Law.*

1. *Immoral.* See tit. *Bond.*

2. *In respect of Trade.* See tit. *Trade.*

3. *In respect of Marriage.* See tit. *Marriage.*

4. *To compound a Criminal Prosecution.* See tit. *Compounding.*

V. GENERAL REQUISITES OF DEEDS—(*continued*).

5. *To withhold Evidence.* See tit. *Evidence.*

6. *Illegal Traffic.* See tit. *Smuggling.*

2. *By Statute.*

1. *Bribery.* See tit. *Bribery.*

2. *Gaming.* See tit. *Gaming.*

3. *Gambling Insurances.* See tit. *Insurance.*

4. *Price of Spirituous Liquors.* See tit. *Spirituous Liquors.*

5. *Ransom of a Captured Ship.* See tit. *Ship and Shipping.*

6. *Sale of Offices.* See tit. *Offices.*

7. *Signing a Bankrupt's Certificate.* See tit. *Bankrupt.*

8. *Simony.* See tit. *Simony.*

9. *Stock-jobbing.* See tit. *Stock-jobbing.*

10. *Usury.* See tit. *Usury.*

(*c*) AS TO ITS BEING IN WRITING OR PRINTING, p. 377.

(*d*) AS TO ITS BEING ON PAPER OR PARCHMENT, p. 377.

(*e*) AS TO THE PARTICULAR LANGUAGE AND CHARACTER TO BE ADOPTED, p. 377.

(*f*) AS TO ITS BEING STAMPED. See tits.

Apprentice,
Arbitration,
Attorney,
Bail-Bond,
Bond,
Charterparty,
Copyhold,
Lease,
Mortgage,
Partition,
Releases.

(*g*) AS TO THE SEALING, SIGNING, AND DELIVERY OF A DEED.

1. *As to the Sealing,* p. 377.

2. *As to the Signing,* p. 377.

3. *As to the Delivery,* p. 377.

(*h*) AS TO THE ATTESTATION, p. 378.

(*i*) AS TO THE RE-EXECUTION OF, p. 378.

VI. RELATIVE TO THE CUSTODY OF A DEED, p. 379.

VII. RELATIVE TO THE CONSTRUCTION OF DEEDS.

(*a*) IN GENERAL, p. 379.

(*b*) AS TO PARTICULAR DEEDS. See tits.

Annuity,
Apprentice,
Arbitration,
Attorney,
Bail,
Bond,

VII. RELATIVE TO THE CONSTRUCTION OF DEEDS—(*continued*).

Charterparty,
Composition with Creditors,
Copyhold,
Covenant,
Gift,
Guarantee,
Indemnity,
Insurance,
Lease,
Marriage,
Mortgage,
Partner,
Principal and Agent,
Recognisance,
Release,
Replevin,
Vendor and Purchaser.

VIII. RELATIVE TO CONTRACTS OR EVIDENCE VARYING OR CONTROLLING DEEDS, p. 381.

IX. RELATIVE TO ALTERATIONS IN, p. 381.

X. RELATIVE TO LOST DEEDS, p. 381.

XI. RELATIVE TO THE REMEDIES AT LAW TO ENFORCE PERFORMANCE OF DEEDS.

(*a*) HOLDING TO BAIL, p. 382.

(*b*) AS TO THE PLEADINGS.

1. *Declaration,* p. 382.
2. *Profert,* p. 382.
3. *Oyer,* p. 383.
4. *Pleas.*
   1.—*In general,* p. 383.
   2.—*In denial.*
      1. *Nil debet.* See tit. *Plea.*
      2. *Non est factum.* See tit. *Plea.*
   3.—*In Confession.* See tit. *Payment of Money into Court.*
   4.—*In Avoidance.*
      1. *By Common Law.* See tits. *Duress—Infancy.*
      2. *By Statute.* See tits. *Bail—Gaming—Usury.*
   5.—*In Excuse.*
      1. *By Common Law.* See tits. *Arbitration—Indemnity.*
      2. *By Statute.* See tit. *Bail.*
   6.—*In Discharge.* See tits. *Bankrupt—Bond—Insolvent—Release—Set-off—Tender.*
5. *Replications, Rejoinders, &c., are arranged under the Pleas to which they are respectively applicable.*

(*c*) AS TO THE EVIDENCE.

1. *Proof of Execution.*

XI. RELATIVE TO THE REMEDIES AT LAW TO ENFORCE PERFORMANCE OF DEEDS—(*continued*).

1.—*Must be proved by the attesting Witness*, p. 384.

2.—*Proof, when the attesting Witness is dead, blind, or cannot be found*, p. 385.

3.—*As to, when Proof of Execution need not be adduced*, p. 385.

2. *Inspection and Production of*, p. 387.

3. *Copy of Deed*, p. 388.

(*d*) WITNESSES, p. 388.

(*e*) DAMAGES, COSTS, AND JUDGMENT, p. 388.

I. RELATIVE TO WHAT CONTRACTS MUST BE BY DEED. See 7 *Peters. Abr.* 635; *Dixon on Deeds.*

II. RELATIVE TO THE DIFFERENCE BETWEEN DEEDS AND PAROL CONTRACTS*.

III. RELATIVE TO THE DIFFERENCE BETWEEN DEEDS POLL AND INDENTURES†.

V. GENERAL REQUISITES OF DEEDS.

(*a*) PARTIES TO CONTRACT‡.

(*b*) AS TO THE CONSIDERATION.

1.—*In general.*

BOTTRELL *v.* SUMMERS, T. T. 1828. Ex. 2 *Y. & J.* 407.

Under special circumstances,

A DEED recited that it had been agreed that £——, part of the purchase-money, should be paid to a mortgagee, and the residue to

* The principal points in which a deed differs in effect from a parol contract are, 1st, that the want of consideration is no defence at law; (Plowd. 308; 7 T. R. 477; 4 East, 200); 2dly, that in pleading a deed it is not in general necessary to shew that it was founded on any consideration; 3rdly, that statements in a deed cannot be controverted, or evidence admitted to shew that it was made diverso intuitu, except in cases of fraud or illegality; (3 Ter. Rep. 418); 4thly, that the efficacy of a stipulation by deed cannot be affected but by deed; (8 East Rep. 344; 1 East, 619; 7 East, 607; 5 Taunt. 452; 8 Taunt. 31; 1 Moore, 460); 5thly, that a deed binds the heir, when named; (2 Saund. Rep. 135; S. C. 1 Vent. 159); 6thly, that a deed is in some cases entitled to preference over simple contract debts; (5 Ter. Rep. 307); 7thly, that a deed is not affected by the Statute of Limitations as to six years; (Cowp. 102); 8thly, that in pleading a deed it is in general necessary to make profert of the deed, or state an excuse for the omission; (3 Ter. Rep. 151; 4 East, 585); 9thly, that in case of a deed where a profert is necessary, the other party is entitled to an oyer and copy; and lastly, that if a deed be expressly given to secure a pre-existting simple contract debt, the latter will be merged. (3 East, Rep. 251),

† There are two sorts of deeds: 1st, a deed poll, which is in strictness a declarration of some one particular person; and 2dly, an indenture, which is a mutual agreement between two or more persons. (Littleton, 370).

‡ All persons having a legal capacity, and sufficient mental ability to contract, may become bound by deed; (see 5 Co. 119; 4 Co. 124; Roll. Abr. 340); but if an ignorant person be induced to execute a deed supposing it to operate one way, and it operates another, it is invalid. (*Doe* d. *Lloyd* v. *Bennett*, 1837, N. P., 8 C. & P. 124).

the vendor, and the acknowledgment of the consideration "was of the payment of the said sum of £—— to the mortgagee, at or before the sealing &c., the receipt whereof the mortgagee acknowledged &c.;" but as to the residue, the language was in consideration of the said residue paid to the vendor, "as before mentioned, and the receipt whereof, as also the payment of the mortgage-money, making the whole £——, the vendor thereby acknowledged, and from the same and every part thereof acquitted &c.;" a receipt was also indorsed for the full sum.

it may be shewn all the consideration was not paid.

The Court (diss. *Vaughan*, B.) upon the authority of *Tompson* v. *Cooke*, (1 B. & A. 66), held that the vendor was not estopped from shewing part of the consideration money unpaid, the words of the acknowledgment, "of the consideration paid to the vendor," as before mentioned, referring only to the agreement to pay, and not to an actual payment.

(*c*) As to its being in writing or printing*.

(*d*) As to its being on paper or parchment†.

(*e*) As to the particular language and character to be adopted‡.

(*g*) As to the sealing, signing, and delivery of a deed.

1. *As to the sealing*§.

2. *As to the signing*‖.

3. *As to the delivery.*

Owen *v.* Bowen, M. T. 1829. N. P. 4 *C. & P.* 93.

A written document was produced signed, and had two seals. It was intended to be a deed—

To constitute a deed it must be delivered as such.

But Lord *Tenterden*, C. J., said, the mere sealing does not make it a deed; it must have been delivered as a deed: the attestation is only "signed and sealed in the presence of"—that is not sufficient.

Doe *d.* Lloyd *v.* Bennett, 1837. N. P. 8 *C. & P.* 124.

A party, shortly before his death, executed an irregular deed of gift, and delivered it before the attesting witnesses as his last act and deed; but upon it being suggested that if delivered to the party it would take the property from him in his lifetime, he desired a third party to keep it and not to give it to the grantee in his lifetime.

A deed may be delivered to a third party;

The Court held that the delivery was complete.

* A deed must be written or printed. (2 Bl. Com. 297; 5 B. & Ald. 234).

† All deeds must be written or printed on paper or parchment. (2 Bl. Com. 297).

‡ Any character or language may be adopted to give effect to a deed; consequently a deed written in French or Latin, or in text, court, or Roman hand, is good as a deed as if written in English; (Shep. Touch. 55); unless it may be in those instances which fall within the scope of the 4 Geo. 4, c. 28.

§ The deed must be sealed; that is, an impression made on the wax or other substance constituting the seal. (Shep. Touch. 57, n. f.).

‖ A deed signed by a third person, at the request and in the presence of an illiterate party, is well executed. (*Rex* v. *Longnor*, 1 N. & M. 576; abridged ante, tit. *Apprentice*).

DOE *d.* GARNONS *v.* KNIGHT, T. T. 1826. K. B. 5 *B. & C.* 671; S. C. 8 *D. & R.* 348.

as, to a stranger, even though not the agent for the party for whom delivered.

W. BEING greatly indebted to G., the latter had, in a communication on the subject, expressed, that he relied and expected that W. would provide securities for the debt, and W. promised to make him secure, and shortly afterwards executed, with proper and apt words, a mortgage-deed in the presence of his niece, which she attested. W. took away the deed with him, but shortly afterwards delivered it to her, stating, that it belonged to G., and desired her to put it by. It remained with her till W.'s death, G. being wholly ignorant of it until after that event:—*Garrow*, B., directed the jury to say, 1st, whether it was duly executed; and 2ndly, whether the delivery to the niece was a parting with the possession, and of the power and control over it, for the benefit of G.; that if only for custody for W. it could not be a good delivery. The jury having found a verdict for the plaintiff; on motion for a new trial—

The Court refused the rule; being of opinion that the delivery by W. to the niece made it a good and valid deed from the time it was put into her possession, although she was not agent for the party for whom delivered.

(*h*) AS TO THE ATTESTATION.

DOE *d.* BANK OF ENGLAND *v.* CHAMBERS, E. T. 1836. K. B. 6 *N. & M.* 539; S. C. 4 *Ad. & E.* 410.

A memorandum attached to a deed with a corporation seal, and subscribed by "A. B., secretary," is not an attestation*.

A DEED was produced, with the seal of the Governor and Company of the Bank of England affixed, and at the foot of the seal was this memorandum—"Sealed by order of the Court of Directors, &c. J. KNIGHT, Secretary."

The Court held, that the memorandum could not be considered as an attestation, so as to make it necessary to call Knight to prove the sealing; and in fact it could not be considered an attestation at all.

(*i*) AS TO THE RE-EXECUTION OF.

HUDSON *v.* REVETT, E. T. 1825. C. P. 5 *Bing.* 368; S. C. 2 *M. & P.* 663.

Where the sum was inserted in the deed after execution:—Held, that it was properly left to the jury to presume re-execution.

ON the execution of a composition deed with creditors, a dispute arising as to the exact amount of the debt of one, the deed was executed with a blank as to that sum, and the amount was inserted the following day upon the vouchers being produced, but the attesting witness was not present, and the deed was not proved to have been re-executed or re-delivered, but there was evidence of its being subsequently recognised and acted upon by the defendant.

* Deeds ought to be attested in the same room in which they are executed, and not carried away for attestation. The witnesses ought to be careful that they hear the formal words of delivery used; and it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate the instrument in the presence of the witness, as, by saying, "this is my power of attorney," or the like, would be laying down a rule sometimes productive of inconvenience. (*Loyd* v. *Freshfield*, T. T. 1826, N. P., 2 C. & P. 325).

The Court held, that the Judge properly referred it to the jury to say whether they could not presume an execution after such insertion, although it was not to be considered as delivered as a perfect deed until the sum was so inserted. *Holroyd*, J., also held on the trial, that the attorney who prepared the deed on the retainer and on the behalf of the trustees was a competent witness in an issue directed by the Court to try its validity, notwithstanding one of the trusts was for the payment in the first instance of the costs attending the preparation of it, and he was also a defendant in another action, the result of which depended on the validity of the deed.

VI. RELATIVE TO THE CUSTODY OF A DEED.

LORD *v.* WARDLE, M. T. 1836. C. P. 3 *Bing. N. S.* 680; S. C. 4 *Scott*, 402.

In trover for a deed, on the question to whom it belongs, the interest of the party must be left to the jury.

IN an action of trover for a deed, it appeared, that a father had executed a conveyance in order to qualify his son, which the attorney of the former prepared, and had produced it on behalf of the son before magistrates, but it remained in his custody upon an alleged agreement by the son that he should hold it as a security for the general bill of costs, &c. due from the father. After the death of the father he applied for the costs of the conveyance.

The Court held, that, if any interest in the property were intended to pass, the deed belonged to the son, and the father could not give a lien thereon; and that the attorney was estopped from saying that no interest passed, the jury having given a general verdict for the defendant. The Court granted a new trial, on the ground of misdirection of the Judge, who merely left it to the jury whether the deed was the property of the father or son.

VII. RELATIVE TO THE CONSTRUCTION OF DEEDS.

(*a*) IN GENERAL.

BARLOW *v.* RHODES, H. T. 1833. Ex. 1 *C. & M.* 439.

In the absence of express words, the ordinary legal meaning will be the mode of construction.

IN trespass, on the question whether a way not strictly appurtenant passed under the words, "together with all ways thereto belonging, or in anywise appertaining"—

The Court said, that the construction of a deed must be primâ facie at least according to the legal meaning of the language used; and that in the present case, unless it could be collected that the parties intended to use the words in a more extensive sense than their ordinary legal signification, the way did not pass.

DOE *d.* DEARDEN *v.* MADEN, E. T. 1833. K. B. 1 *N. & M.* 533.

Words of feoffment may be presumed.

BY a deed of grant in 1279, to the abbot and monks of W., "of that pasture called B., to feed their animals," and that the grantees should have "in that pasture 100 cows;" and subsequently, by deed in 25 Edw. 3, the then lord, upon a dispute with the monks, remised and released all his right and claims within the pasture,

and that it should be lawful for the abbot &c. to inclose and reduce it to cultivation &c., waiving a right to the grantor and his heirs to hunt, &c.

The Court held, that it being clearly the intent of the releasor to pass a separate interest in the soil, although there were no words amounting to a feoffment with livery of seisin, yet, as it was to be presumed the abbot, &c., were in possession, it would operate as a conveyance by way of release, and pass the fee.

DOE *d.* WERE *v.* COLE, M. T. 1827. K. B. 7 *B. & C.* 243; S. C. 1 *M. & Ry.* 33.

A deed, containing words operating by way of grant, may pass the reversion.

IN ejectment, it appeared that A. by deed "demised, leased, granted, assigned, transferred, set over, limited, and appointed" to B. the moiety of certain lands then "in the possession of A. and of C.," habendum to B. during the life of A., in trust for sale. No livery of seisin was indorsed or made. C. was, at the date of the deed, tenant from year to year to A. of part of the land.

The Court held, that a deed which was intended to pass the immediate possession, but which was inoperative for that purpose, might serve to pass the reversion, if it were clear that the grantor's intention was to pass his interest, no matter by what mode; and if, also, there were words in the deed sufficient to carry the reversion.

GOODTITLE *d.* DODWELL *v.* GIBBS, T. T. 1826. K. B. 5 *B. & C.* 709; S. C. 8 *D. & R.* 502.

The operative part of the deed controls the habendum.

CONVEYANCE by lease and release of premises to A., and to his heirs and assigns, to hold to A., his heirs and assigns, from and immediately after the death of &c., to the uses &c.

The Court held, that the premises of the deed describing the estate granted was the operative part of the deed; and that the habendum, repugnant thereto and against the rule of law, was to be rejected, and the deed stand good upon the premises.

See Carter v. *Madgwick*, 3 *Lev.* 339; *Jarman* v. *Orchard*, *Skin.* 528; *Salk.* 346; *Show*, 199.

DOE *d.* MEYRICK *v.* MEYRICK, H. T. 1832. Ex. 2 *C. & J.* 223; S. C. 2 *Tyrw.* 178.

Where there is a specific description of certain closes in a deed, other closes will not pass by the addition of general words; identity of closes is a question for the jury.

IN ejectment, it appeared that the premises, as originally settled, consisted of the mansion, thirteen closes, and certain mills; and in 1816 the tenant in tail suffered a recovery, and in the deed declared the intention to be to convey the mansion and eight specific closes, by name described as parcel of the demesne lands called C.; held that the remaining five closes did not pass under the general words following the particular description. In 1824, the son, by a deed reciting the original settlement, and that the joint tenant in tail had done nothing to bar the entail of the lands therein comprised, conveyed the mills, and all those five fields, part of the C. estate, &c.

The Court held, that there being no other premises corresponding in number and quantity than those which were alleged not to have been included in the former recovery, and the question of identity having been found by the jury, these closes passed by the latter deed.

PEARSE *v.* MORRICE, M. T. 1834. K. B. 4 *N. & M.* 48; S. C. 2 *A. & E.* 84.

BY a local act trustees had power to make leases, provided the lease was duly executed by the trustees &c., and the rent reserved payable to the treasurer &c. of the trustees &c., or in default the lease to be void."

To make a recital in a deed an estoppel, it must, it seems, form part of the deed.

The Court said, that in cujus rei testimonium is no part of the deed, and that the execution of a counterpart by the defendant, in which it was alleged that to one part of which said indenture the said trustees had affixed their hands and seals, could not estop the defendant from calling on the plaintiffs to prove that the lease was executed by the trustees.

VIII. RELATIVE TO CONTRACTS OR EVIDENCE VARYING OR CONTROLLING DEEDS.

DOE *v.* WHEELER, H. T. 1840. Q. B. 4 *P. & D.* 273.

IN ejectment by churchwardens and overseers, it appeared that the premises were conveyed, " with the appurtenances thereto belonging."

The conditions of sale cannot be received to contradict a deed of conveyance of the same property*.

The Court held, that the deed of conveyance being sufficient to include a strip of garden used with the house sold, the conditions of sale excepting it were inadmissible to contradict the deed.

IX. RELATIVE TO ALTERATIONS IN†.

X. RELATIVE TO LOST DEEDS.

MUNN *v.* GODBOLD, M. T. 1825. C. P. 3 *Bing.* 292; S. C. 11 *Moore*, 49; S. C. 2 *C. & P.* 97.

To an action of covenant on an agreement under seal, the plaintiff proved that there were two parts of the instrument, one of which, executed by him, was delivered to the defendants, and the other, executed by the defendants, was delivered to him, and that he had lost his part; and he offered the draft or copy of the agreement in evidence, on which the defendants tendered the part executed by the plaintiff, but which was not stamped.

Where a deed has been lost, the counterpart, and not the copy, is the best evidence.

The Court held, as it was the best evidence of the lost deed, it was admissible without a stamp; and that a copy could not have been received as evidence under such circumstances.

* A memorandum, not under seal, and not referred to in the deed, can in no way control the deed; (*Wenham* v. *Fowle*, M. T. 1834, K. B., 3 D. P. C. 43); so, where the conveyance of the reversion of premises on lease released all the parties' interest:—Held, that parol evidence as to apportionment of the current quarter's rent could not be received. (*Flinn* v. *Calow*, H. T. 1840, C. P., 1 M. & G. 589; abridged tit. *Rent*).

† Where a deed after execution had been altered, yet the estate which originally passed by the deed remaining still vested:—Held, that the deed was admissible in evidence by lessor of plaintiff in ejectment. (*Doe* v. *Beanland* v. *Hirst*, 1820, N. P., 3 Stark. N. P. 60).

XI. RELATIVE TO THE REMEDIES AT LAW TO ENFORCE PERFORMANCE OF DEEDS.

(*a*) Holding to bail. See ante, tit. *Arrest.*

(*b*) As to the pleadings.

1. *Declaration.*

Gully *v.* Bishop of Exeter, T. T. 1827. C. P. 4 *Bing.* 290.

The declaration stating the legal effect

The declaration stated that J. S., by deed (not set out in hæc verba), conveyed a property, or fourth part of an advowson, and the deed produced purported to convey the entire advowson; but it appeared that the grantor had only the fourth part.

The Court held, that as the effect of the deed was to pass only a fourth part, it was no variance.

Wilson *v.* Bramhall, M. T. 1826. Ex. 1 *Y. & J.* 2.

and operation of the deed is sufficient.

In an action on a lease, the declaration, in setting out the lands demised, stated them as "a certain farm and buildings, together with certain pieces or parcels of land particularly set forth in the said indenture."

The Court held there was no variance in not setting out the lands demised in the parcels enumerated in the lease, and that the mode of stating them was sufficient. It is enough to state the legal operation and effect of the deed in the declaration.

---

2. *Profert.*

Jenkin *v.* Peace, T. T. 1840. Ex. 8 *D. P. C.* 758; S. C. 6 *M. & W.* 722.

In pleading a conveyance by lease and release, profert must be made.

To trespass for breaking and entering defendant's close the defendant pleaded a conveyance by lease and release. Special demurrer, assigning for cause that the defendant ought to have made profert of the deed.

Per Cur.—The rule is laid down in *Dr. Leyfield's case,* (10 Rep. 92 a.), that if he who is a party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims but parcel of the original estate, yet he ought to shew the original to the Court. We think that rule must govern the present case. Judgment for plaintiff.

Hill *v.* Marsden, T. T. 1840. Ex. 8 *D. P.* C. 756; S. C. 6 *M. & W.* 718.

It is no excuse for profert that the deed is in the possession of a third party, unless he refuses to produce it.

The plaintiff declared on an indenture of demise, and alleged, as an excuse for not making profert of the deed, that it was in the possession of a third party, by an agreement between the plaintiff and defendant.

The Court held, that though the defendant might have an equal control with the plaintiff over the deed, yet that did not impose on him the onus of applying for it; and that the excuse was insufficient, in not shewing that the party in possession of the deed had refused to produce it.

FISHER *v.* FORD, T. T. 1840. Q. B. 4 *P. & D.* 347.

IN an action of covenant, the plaintiff in the declaration alleged as an excuse for profert, that the deed "being in the possession of the defendant," the plaintiff could not produce it. The defendant pleaded that the deed was not in his, the defendant's possession, modo et formâ. On demurrer—

The Court held that the plea could not be sustained.

If the excuse for profert be that it was in the defendant's possession, the defendant cannot traverse that fact by plea.

---

3. *Oyer.*

LORD PORTMORE *v.* GORING, E. T. 1827. C. P. 4 *Bing.* 152; S. C. 12 *Moore*, 363.

ON a rule to shew cause why the defendant should not give the plaintiff oyer of an indenture, or permit him to take a copy of it.

The Court refused to order the defendant to give the plaintiff or permit him to take a copy of it, on an affidavit of the plaintiff's attorney, who stated, that there was no counterpart in the possession of the plaintiff, and that the attorney who had prepared the deed and counterpart had absconded. The affidavit should have stated there was no counterpart in existence.

To obtain oyer and copy of a lease by the plaintiff, he must shew that the counterpart is not in existence.

SNELL *v.* SNELL, M. T. 1825. K. B. 4 *B. & C.* 741.

IN covenant the declaration stated, that the defendants had agreed to deliver to the plaintiff sufficient timber growing on the premises for the repair of certain messuages, mills, and premises in the parish of B., in the county of D., but that they had not delivered the timber, although there was sufficient growing on the premises for that purpose. The defendants craved oyer of the lease, and then pleaded non est factum. It appeared that the deed did not agree with the breach.

The Court held, first, after oyer the deed becomes part of the declaration; and second, that as the defendants only pleaded non est factum, the only question which could be agitated on that issue was, whether the deed so set out was or was not executed by the defendants.

After oyer the deed becomes part of the declaration; and if it does not agree with the breach, and defendant replies non est factum, the only question is, whether the defendant executed the deed or not.

---

4. *Pleas.*

1. *In general*.*

STYLES *v.* WARDLE, M. T. 1825. K. B. 4 *B. & C.* 908; S. C. 7 *D. & Ry.* 507.

THIS was an action on a deed dated December 24th. Defendant covenanted that he would within twenty-four calendar months, then next after the date of the said indenture, do certain acts; and to an action for breach of such covenants defendant pleaded that in fact the deed was executed and delivered long after the time in

A plea, that the deed was delivered after the date, is bad.

* Plea, stating a deed covenanting not to sue; the plaintiff craved oyer, but, without setting it out, replied non est factum, and added the similiter, and proceeded to trial:—Held irregular. (*Smith* v. *Jennings*, M. T. 1840, B. C., 9 D. P. C. 155).

Accord without satisfaction cannot be pleaded to a deed. (*Parker* v. *Rams-*

which it bore date, to wit, on &c.; and that twenty-four calendar months had not elapsed from the execution. On demurrer—

The Court held the plea bad. Where there is a sensible date to a deed, the word date means the day of the date and not of the delivery; but if there be no date, or an insensible one, the words, ut res valeat, may be construed delivery.

HARDEN *v.* CLIFTON, E. T. 1841. Q. B. 1 *G. & D.* 22.

So, a plea that the deed was altered after execution must shew that the alteration was in writing.

To an action of debt on bond against the surety, he pleaded, that, after the making &c., a certain material addition was made to the condition thereof by the plaintiff and with his privity, and without the knowledge or consent of the defendant, which addition is as follows; that is to say, &c. On demurrer—

The Court held that the plea was bad upon general demurrer, as being too loose, and for not stating that the addition was made in writing.

(*c*) AS TO THE EVIDENCE*.

1. *Proof of Execution.*

1.—*Must be proved by the attesting Witness.*

DOE *d.* SMYTHE *v.* CLAXTON, E. T. 1829. C. P. 11 *Moore*, 347.

An attesting witness stating that he should not have signed the deed unless he had seen it executed is sufficient proof of the execution.

IN an action on a deed, the attesting witness, on being called, stated that he knew the defendant, one of the parties; that the attestation was in his (the witness's) handwriting; that he did not know whether or not the signature to the deed was the defendant's handwriting, but that he would not have put his name to it unless he had seen the defendant execute it.

The Court held that statement sufficient proof of the execution of the deed.

bottom, M. T. 1824, K. B., 3 B. & C. 257; S. C. 5 D. & R. 138; abridged, post, tit. *Usury*).

* An examined copy of a deed in the registry of the county of Middlesex is admissible as secondary evidence of its contents. (*Doe* d. *Ubele* v. *Kilner*, T. T. 1826, N. P., 2 C. & P. 289). Where the subscribing witness to a deed could not be produced:—Held, that proof of his handwriting was sufficient, even though the defendant only signed the deed by his mark. (*Mitchell* v. *Johnson*, 1836, N. P., M. & M. 176). A lease purported to have been signed by the mark of the party; a person proved the handwriting of the subscribing witness, and that he had gone abroad; and another person proved that the defendant had spoken of the term that he had under the lease:—Held, that this was sufficient proof of the execution of the lease by the defendant. (*Doe* d. *Wheeldon* v. *Paul*, E. T. 1829, N. P., 3 C. & P. 613). The attestation of a deed was in the following form:. "Sealed and delivered by the within-named A. B., in the presence of C. D." It was proved by the attesting witness that the signature A. B. was of his handwriting, and that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed:—Held sufficient, and that the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference. (*Doe* d. *Counsell* v. *Caperton*, 1839, N. P. 9 C. & P. 114).

So, where a deed appears duly signed, sealed, and attested, the sealing and delivery will be inferred to have taken place, although the attesting witness speaking positively as to signing cannot remember as to the other requisites. (*Burling* v. *Paterson*, T. T. 1840, N. P., 9 C. & P. 570).

Where A., an equitable mortgagee, gave a schedule of the deeds deposited,

2.—*Proof, when the attesting Witness is dead, blind, or cannot be found.*

BAMPTON *v.* PAULIN, H. T. 1827. C. P. 4 *Bing.* 264; S. C. 12 *Moore*, 497.

To a lease there were two attesting witnesses: one was dead; and to excuse the absence of the other witness, it appeared that the lease had been executed twenty-three years before, and that inquiry had been made at several places where the witness (a female servant) had lived, but that no one could tell what had become of her.

The Court held that secondary evidence might be given.

If one attesting witness be dead, and the other cannot be found, parol evidence may be given*.

MORGAN *v.* MORGAN, M. T. 1832. C. P. 9 *Bing.* 359; S. C. 2 *M. & Scott*, 490.

AN attesting witness could not be found, and his clerk stated he had, on the 11th July, 1832, received a letter from the witness, but that letter did not shew where he was; and a sheriff's officer, from whom he had escaped, stated that search had been made for him for twelve months in vain. At the trial before Lord *Abinger*, secondary evidence was received, and a verdict found for the plaintiff. On motion for a nonsuit—

The Court held that the evidence of the handwriting was admissible, it being clear that the witness had absconded; and that the case clearly fell within the principle established by *Crosby* v. *Perry*, (1 Taunt. 364), and *Cunliffe* v. *Sefton*, (2 East, Rep. 183).

After refusal to admit, and the attesting witness being absent to avoid process, and that for twelve months, secondary evidence is admissible.

3.—*As to, when Proof of Execution need not be adduced*†.

DOE *v.* SAMPLES, E. T. 1838. Q. B. 3 *N. & P.* 254.

BY a marriage settlement, lands were entailed upon the children of the marriage. It was made with trustees, and the husband covenanted to deliver over the title-deeds of his estate to them. He kept both the settlement and the title-deeds, and many years afterwards mortgaged his lands, and delivered the deeds to the mort-

There need not be proof of execution after thirty years.

describing one as executed by B. In ejectment by the mortgagee:—Held, that the subscribing witness ought to be called. (*Doe* v. *Penfold*, 1838, N. P., 8 C. & P. 536).

* If the attesting witness be dead it is sufficient to prove his signature to the deed without proof of the signature of the party executing, or any evidence of the identity of the party. (*Page* v. *Mann*, 1 M. & M. 79).

Where an attesting witness has become blind, it affords no ground for dispensing with his attendance, as he may from recollection give material evidence as to the facts accompanying the execution of the instrument. (*Crank* v. *Frith*, M. T. 1839, N. P., 9 C. & P. 197; S. C. 2 M. & Rob. 262).

In a prior case, it was held, that if the attesting witness becomes blind, proof of his handwriting, without calling him as a witness, is sufficient. (*Pedler* v. *Paige*, 1833, N. P., 1 M. & Rob. 258).

Where the subscribing witness to the deed of proprietors constituting a company was beyond seas:—Held, that proof of his handwriting was sufficient, without further proof of the handwriting or identity of the parties. (*Kay* v. *Brookman*, M. T. 1828, N. P., 1 M. & M. 286; S. C. 3 C. & P. 555, overruling *Nelson* v. *Whittall*, 1 B. & A. 19).

† In ejectment by the heir-at-law against a defendant, who claimed under a lease granted by an ancestor of the lessor of the plaintiff, if such lease, being in the hands of the plaintiff, be produced at the trial by him on notice, it may be

gagee. Upon his death the settlement was found, and taken possession of by an attorney for the heir of one of the trustees, who were both dead. In an action of ejectment by the mortgagee against the tenant in tail, the deed, then more than thirty years old, was produced by the attorney—

The Court held, that it was not necessary for the defendant to prove its execution.

BURNETT *v.* LYNCH, T. T. 1826. K. B. 5 *B. & C.* 589; S. C. 8 *D. & R.* 368.

It is not competent to a party, who has taken under a deed all the interest which it gave, to dispute its due execution.

IN an action by lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it.

The Court held, 1st, that where a party to an action has taken an interest under a deed, it is not necessary to produce the attesting witness in order to prove it; and 2ndly, that where a party to an action has by his own deed recited another, it is not necessary to prove the execution of that other deed.

DOE *v.* WILKINS, M. T. 1835. K. B. 5 *N. & M.* 434.

So, execution of deed need not be proved by plaintiff when he as well as defendant claim under it, and defendant produces the document;

A LEASE was granted to a feme covert as to a widow, (her husband being alive, and who survived her); and she assigned all her interest to her son, who took possession, and devised to the defendant. The lessor of the plaintiff claimed as administrator to the husband. In ejectment, both parties claimed under a lease produced by the defendant; under a notice to produce—

The Court held, that the plaintiff was not bound to prove the execution of the deed.

DOE *d.* TYNDALE *v.* HEMING, M. T. 1826. K. B. 6 *B. & C.* 28.

especially after the recognition of a deed as a valid instrument.

IN an action of ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants, (the tenant in possession), a lease of the premises granted to him for a term not then expired, in order to prevent the defendant from setting it up to defeat the action.

The Court held, that he thereby recognised the instrument as a valid one, and that, when produced in pursuance of a notice from the defendants, it might be read in evidence, without calling the subscribing witness to prove the execution by the grantor of the lease.

VACHER *v.* COCKS, T. T. 1830. K. B. 1 *B. & Ad.* 151.

The dispensing with the evi-

A PARTY produced a deed which had been for some time in his possession, and offered it in evidence against a party who formerly

given as evidence, without proof of its execution by the subscribing witness. (*Doe* d. *Tindale* v. *Hemming*, 1826, N. P., 2 C. & P. 462). A party, after notice and refusal to produce a deed, cannot, after proof of notice, and of the deed being in his possession, and also of an examined copy, by producing the original insist upon its being proved by the attesting witness, nor object to the copy thereof being read. (*Jackson* v. *Allen*, 1818, N. P., 3 Stark. N. P., 74). Where a copy of a deed is admitted, it is unnecessary to call the attesting witness, although the original appears to have been subscribed by one. (*Poole* v. *Warren*, 1838, K. B., 3 N. & P. 693; abridged, post, tit. *Evidence*).

claimed and derived a benefit under it, but afterwards abandoned that benefit, and gave up the deed to the party then producing it in evidence. It was proposed by the plaintiffs to put this deed in evidence without calling the subscribing witness, but Lord *Tenterden*, C. J., on the authority of the cases of *Pearce* v. *Hooper*, (3 Taunt. Rep. 60), *Orr* v. *Morice*, (6 Moore, 348; S. C. 3 B. & B. 139), decided, that the rule dispensing with the evidence of a subscribing witness, where the deed is produced by an adverse party, applies only to its production *at the trial*, and rejected the deed as evidence. On motion for a new trial—

The Court concurred in the view taken by Lord *Tenterden*.

dence of a subscribing witness, where a deed is produced by an adverse party, applies only to its production at the trial.

---

2. *Inspection and Production of*.*

HEWETT *v.* PIGOTT, H. T. 1831. C. P. 7 *Bing.* 400.

IN an action against the sheriff for a false return, to prove an assignment for the benefit of creditors, two deeds, executed in the year 1823, were produced; only one of those deeds was read in evidence, the other, the execution of which was admitted, was withdrawn. The plaintiff had a verdict, and on a new trial being granted, motion was made for leave for the plaintiff to peruse and take a copy of both deeds.

Per Cur.—In this case there is a distinction as to the two deeds: one was read in evidence, and the Court and jury heard it. No injustice will therefore be done by compelling the defendant to produce to the plaintiff and allow him to copy that deed; for it would have been fair to impose it as a term of the rule for a new trial. But with regard to the other that was not given in evidence, its execution was admitted, but the defendant withdrew it; of that the plaintiff is not in justice entitled to a copy.

If two deeds be relied on, but one only read, although the other be admitted, on a new trial the adverse party is only entitled to have inspection of the one read.

WOODCOCK *v.* WORTHINGTON, M. T. 1827. Ex. 2 *Y. & J.* 4.

ON motion for leave to inspect and take a copy of a deed, it appeared that there were two parts of a lease, and that they were interchangeably executed, and the part in the possession of the plaintiff was lost.

The Court refused to interfere to compel the defendant to permit the plaintiff to inspect and take a copy of that part which was in his possession.

But, where two parts of a deed have been executed interchangeably, the Court will not compel inspection because one part only is executed.

COCKS *v.* NASH, T. T. 1832. C. P. 9 *Bing.* 723; S. C. 3 *M. & Scott*, 164.

ON motion to compel a third person, not party to the suit, to produce for inspection deeds which he held as trustee—

The Court refused the application, and said, that it made no difference that such party was an attorney, the deeds not having come to him in his professional character.

A third party, possessed of deeds, is not bound to produce them for inspection.

* Under an order to deposit for inspection, the party has no right to lock deeds in a box and keep the key so as to be present when inspected. (*Preston* v. *Carr*, 1 M. & Y. 457; abridged, post, tit. *Evidence*).

GILLETT *v.* ABBOTT, H. T. 1838. Q. B. 3 *N. & P.* 24.

If a question arises as to the character in which the defendant is liable, whether as trustee or shareholder, the deed must be produced, though admitted by the plea.

THE declaration in covenant on a deed of indemnity set forth a recital of the plaintiff having been trustee; and the breach complained of was the not indemnifying of the plaintiff from a debt for which he had become liable in his character of trustee. The plea traversed the breach. The plaintiff contended, that, as the deed was admitted by the plea, it need not be produced nor its execution proved. But Lord *Denman*, C. J., was of opinion, that the plaintiff was bound to produce, and prove the execution of the deed. And the plaintiff was nonsuited. On motion to set the nonsuit aside—

The Court held, that it was incumbent upon the plaintiff to produce the trust deed, and prove it by calling the attesting witness.

DOE *d.* COURTAIL *v.* THOMAS, H. T. 1829. K. B. 9 *B. & C.* 263; S. C. 4 *M. & Ry.* 218.

If A. be bound to produce a deed, and it be deposited with B. under an order of Court, if A. be bound to produce it, B. must produce it*.

BY an order of the Court of Chancery made in a suit depending between the lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. In an action of ejectment brought by the lessor against the tenant—

The Court held, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title; and said, that if A. be possessed of a deed, and it passes into the hands of B., if A. were bound to produce it, B. must do so also.

---

3. *Copy of Deed*†.

(*d*) WITNESSES‡.

(*e*) DAMAGES, COSTS, AND JUDGMENT. See tits. *Costs—Covenant—Judgment.*

Deer Stealing. See tit. *Game.*

Defamation. See tits. *Libel—Prohibition—Slander.*

* But where a deed had been deposited with a witness as a security:—Held, he was not bound to produce it if it affected his interest. (*Schlenker* v. *Moxey*, 3 B. & C. 789; S. C. 5 D. & R. 747; S. C. 1 C. & P. 178; abridged, tit. *Witness*).

Where it was sworn that the original deed had been stolen from the plaintiff by a party at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant:—The Court made a rule absolute for giving secondary evidence of its contents. (*Doe* d. *Pearson* v. *Ries*, 7 Bing. 725).

† Where the cause had been tried and a rule for a new trial obtained, the Court refused to compel a copy of the deed, the sufficiency of which was to be discussed on the motion, to be furnished to the plaintiff. (*Wood* v. *Morewood*, M. T. 1840, B. C., 9 D. P. C. 44).

‡ Where premises had been assigned to the witness by the plaintiff as a protection against impressment, but the deeds had long since been given back, and he stated that he believed he held no beneficial interest; yet the Court held, that, as he would, if in possession, have a perfect title against the plaintiff, he was incompetent. (*Doe* d. *Scales* v. *Bragg*, 1 Ry. & M. 87).

Default. See tits. *Appearance—Judgment.*

Defeasance. See tits. *Cognovit—Contract—Warrant of Attorney.*

De Injuriâ*.

GRIFFIN *v.* YEATES, H. T. 1836. C. P. 4 *D. P. C.* 647; S. C. 2 *Bing. N. S.* 845; S. C. 2 *Scott*, 845.—S. P. HALL *v.* FARRAR, H. T. 1836. Ex. 1 *M. & W.* 65; S. C. 1 *T. & G.* 281. See 5 *Ad. & E.* 237.

De injuriâ is a good replication in assumpsit if conformable to the rules laid down in *Crogate's case.*

THE declaration in assumpsit was in the usual form against the defendant, as the acceptor of a bill of exchange, drawn by one W. Lambert, at six months after date, for 358*l.* 12*s.* 2*d.*, and indorsed by Lambert to the plaintiff. Plea, that the defendant accepted the bill of exchange in the declaration mentioned for the accommodation of the said W. Lambert, and upon the understanding and promise of the said W. Lambert in that behalf then made and given, that he, the said W. Lambert, should, on application, furnish the funds for the payment of the said bill, and that the defendant should not be called on to pay the said bill until it should be at the will and discretion of defendant so to do; and that no consideration whatever was so given to defendant, or to any other person or persons, for or on account of the acceptance or payment by the defendant of the said bill of exchange, or for any part of the sum, but the said W. Lambert indorsed the said bill of exchange to the plaintiff after the said bill of exchange became due and payable for the accommodation of the plaintiff, and without any consideration being given to the said W. Lambert, or to any other person or persons for the said bill, or for any part of the same; concluding with a verification. On demurrer to the replication for duplicity, it was contended, that the plaintiff should have replied de injuriâ.

The Court took time to consider. Subsequently, *Tindal*, C. J., said, that it was their opinion, that, as the defendant set out all the

* It was very anciently decided by the famous resolutions in *Crogate's case*, (8 Rep. 66), that the replication of de injuriâ is not good where matter of record is relied on, or where the defendant by his plea claims an interest in the subject-matter of the trespass, or where the defendant derives authority immediately from the plaintiffs. With these exceptions, it is good wherever the plea consists of mere matter of excuse; nor is it material what number of facts it puts in issue. If any of the facts stated in the plea are mixed up with matter of record, or with a claim of interest or authority derived from the plaintiff, the replication may admit the facts which fall within the description of such exceptions, and traverse the remainder of the allegations in the plea, by limiting the traverse by the words "absque residuo causæ."

From the form and language of this replication, which is, "That the defendant of his own wrong, and without the cause by him in his plea alleged, committed the trespasses, (or the grievances), (or broke the promise), in the declaration mentioned, &c.," it is obvious that it is a denial of the cause alleged by the defendant for the trespass or breach complained of. Unless, therefore, the plea consists of matter of excuse or justification, this replication is improper, for there is nothing for it to join issue upon.

facts in his plea, the general replication de injuriâ should be allowable in actions of assumpsit, as long as the plea was mere matter of excuse, and governed by and in accordance with the rules laid down in *Crogate's case*, (8 Rep. 66).

NOEL *v.* RICH, M. T. 1835. Ex. 4 *D. P. C.* 228; S. C. 2 *C., M. & R.* 360; S. C. 5 *Tyrw.* 632.

The plea must contain matter of excuse*.

PLEA to a declaration in assumpsit, by the indorsee against the drawer of a bill of exchange, that it was accepted for the defendant's accommodation; that he indorsed it in blank, and delivered it to Lewis L., to be discounted for his benefit; that Lewis L. delivered it to Lawrence L., as a security for a debt owing from Lewis L., to Lawrence L.; and that the plaintiff, who had received it through several indorsements from Lawrence L., had notice. Replication, that the defendant broke his promise without the cause alleged. On demurrer—

Per Cur.—The plea is bad, but we think the replication is good. The objection to it is one merely of form: it is said the plaintiff alleges only that the defendant broke his promise; whereas the plea goes to shew that he never made it. Under the general issue, no doubt, a party might defend himself by shewing, either that he did not make or that he did not break the promise alleged. But the new rules have introduced greater strictness and precision; and, if a defendant intends to allege that he had a reason for breaking his promise, he must shew that distinctly on the face of his plea. Now, if a man puts his name to a bill of exchange, that is primâ facie a promise, as it is a transferable security to pay the holder,—a promise resulting as matter of law from the nature of the instrument. All the cases, therefore, except where the promise is denied by denying the handwriting, are properly matters of excuse for the non-performance of the promise. Then the question is, whether the plaintiff is not at liberty to put in issue all the facts which make up that excuse, and conclude to the country. If he is, it matters not by what form of words it is done, if he substantially puts all the facts in issue. We think he may so reply, and that the replication in this cause sufficiently supports the declaration. The defendant does not deny the indorsement, which is the primâ facie promise; then the plaintiff says, the reason by the defendant for breaking that promise is not true.

SOLLEY *v.* NEISH, T. T. 1835. Ex. 2 *C., M. & R.* 355; S. C. 5 *Tyrw.* 265.

But not to a plea amounting to the general issue;

MONEY had and received to the plaintiff's use to the amount of 5000*l.* Plea, as to the sum of 5000*l.* in the declaration mentioned, alleged to have been had and received to the plaintiff's use, that it was the proceeds of certain goods consigned to defendant by Messrs. P. & C., as their own goods, with the plaintiff's knowledge and assent, (though in fact the goods of the plaintiff and Messrs. P. &

* In an action by indorsee against acceptor of a bill drawn by one H. B., plea, that the bill was given in lieu of others given for securing monies lent to the defendant for the purpose of gaming:—Held, that, the plea being merely matter of excuse, de injuriâ was a good replication. (*Humphreys* v. *O'Connell*, H. T. 1841, Ex., 9 D. P. C. 213).

C. jointly), as a security for money to be advanced to Messrs. P. & C. by the defendant; that he had advanced more than 5000*l.* on them; and he offered to set off his debt against the damages claimed by the plaintiff in respect of the money in the declaration. The plaintiff replied de injuriâ, and new assigned, that the action was brought, not only for the proceeds of the goods mentioned in the plea, but also for the proceeds of certain other goods deposited by the plaintiff with the defendant. On demurrer—

Per Cur.—The plea is bad as amounting to the general issue, and the replications appear to us to be bad for two reasons: 1st, the plea does not contain matters of excuse for the defendant's breach of promise, but a denial of the promise to the plaintiff. If the replication was framed with an intention to put in issue all the matters alleged in the plea, it has failed of its object; for it cannot be considered as part of the cause of the breach of promise to the plaintiff that the promise was not made to him; and if it be not traversed in the replication, but confessed, it is not avoided, and the said fact stated in the plea and confessed by the replication is an answer to the action. This objection falls under the last cause of special demurrer. 2ndly. If we were to apply the same rules to actions of assumpsit, which have been established as to actions of trespass by *Crogate's case*, and to replevin by others, this plea falls under two of the exceptions therein mentioned, for the defendant claims an interest in the money, and also by the defendant's plea authority is immediately derived from the plaintiff. The general replication is therefore bad.

CRISP *v.* GRIFFITHS, E. T. 1835. Ex. 3 *D. P. C.* 752; S. C. 2 *C., M. & R.* 159; S. C. 5 *Tyrw.* 619.

nor to a plea of accord and satisfaction;

To a declaration in assumpsit on a promissory note, the defendant pleaded, that, after the accruing of the debt in respect of the note, the plaintiff drew a bill of exchange on the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the promissory note; and that the plaintiff indorsed it to a person unknown to the defendant, who was the holder of it at the time of the commencement of the present suit. Replication de injuriâ. On demurrer to the replication—

The Court held that the plea was bad, as it did not expressly state that the bill was given as well as taken in satisfaction of the note. And *Parke*, B., thought the replication bad; and said, may it not be considered that this case falls within the third exception mentioned in *Crogate's case*, (8 Co. 132); where the defendant in his plea derives an authority from the plaintiff?

PARKER *v.* RILEY, H. T. 1838. Ex. 3 *D. P. C.* 375; S. C. 3 *M. & W.* 230.

nor to a plea purporting to avoid the contract on the ground of illegality.

To a declaration upon a contract, the defendant pleaded a special plea, containing a variety of facts; the plaintiff replied de injuriâ. On demurrer—

The Court said:—We are disposed to think the replication is bad. It is somewhat difficult to say what the precise ground of defence stated in the plea is; but it must be, either that the defendant had not the benefit of the skill and personal superintendence of the plaintiff's testator, for which he must be presumed to have con-

tracted, or that the plaintiff was not entitled to recover on the ground of the illegality of the transaction, or both; and on every one of these suppositions the plea does not consist of mere matter of excuse for the non-performance of the contract declared on. It either amounts to the general issue, or is an avoidance of the contract itself. On the first supposition it is clear the replication is bad; on the other, we are all strongly inclined to think it is so; but another question then arises, whether the replication is not good on general demurrer.

REYNOLDS *v.* BLACKBURN, M. T. 1837. B. C. 6 *D. P. C.* 19; S. C. 2 *N. & P.* 136.

But it is no objection that the plea to which it is replied is bad for duplicity.

To an action on a bill of exchange, the defendants pleaded that they accepted the bills for the accommodation of Thomas Tempest, the drawer, without receiving any value or consideration for the said acceptances, or either of them, of which the plaintiff then had notice; and the said defendants further say, that after the bills were indorsed, and before they became due and payable, and before the commencement of this suit, the said T. T., the drawer, gave and delivered to the plaintiff, who then accepted from the said drawer divers other bills of exchange for divers large sums of money, in the whole exceeding the amount of the said sums mentioned in the said bills in the said declaration mentioned, to wit, &c.; and it was on that occasion agreed by and between the said drawer, T. T., and the plaintiff, that the said plaintiff, in consideration of the premises, should forbear to sue him, the said drawer, upon the said bills in the said declaration mentioned, or either of them, for a long time, to wit, for three months, and until default should be made in the payment of the said bills so delivered by the said T. T., the drawer, to the said plaintiff, in payment of the said bills in the said declaration mentioned; and the defendants further say, that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned, and the said agreement was so made by and between the plaintiff and the said T. T. as aforesaid, without the knowledge, privity, or consent of the said defendants, or any of them. Replication, de injuriâ. Demurrer to the replication.

Lord *Denman*, C. J.—If the replication is bad for duplicity, that is occasioned by the necessity of replying to the defendant's bad plea, and cannot be taken advantage of on demurrer.

CURTIS *v.* MARQUIS OF HEADFORT, E. T. 1838. B. C. 6 *D. P. C.* 496.—S. P. PARKER *v.* RILEY, 3 *M. & W.* 230; *overruling* HOOKER *v.* NYE, T. T. 1834. Ex. 1 *C., M. & R.* 258.

And if the replication, de injuriâ, be objectionable, it must be specially demurred to.

DECLARATION on a cheque. Plea, that it was given for a gambling debt. Replication, de injuriâ. General demurrer to the replication. On motion to set it aside—

Coleridge, J.—Is there any case of assumpsit in which the objection to the replication, de injuriâ, has been decided to be bad on general demurrer? I am not aware of any. Consequently, de injuriâ is a good replication on general demurrer.

Del Credere Commission. See tits. *Insurance—Principal and Agent.*

Demand. See tits.

Arbitration,
Bills and Notes,
Cheque,
Constable,
Costs,
Declaration,
Ejectment,
Game,
Judgment,
Lien,
Oyer,
Plea,
Rent,
Trover.

Demise. See tits. *Ejectment—Landlord and Tenant—Lease.*

Demurrage. See tits. *Charter-Party—Insurance—Ship and Shipping.*

Demurrer.

I. TO DECLARATIONS, PLEAS, REPLICATIONS, &c.

See tits.

Account, Action of,
Adultery,
Advowson,
Apprentice,
Arbitration and Award,
Assault and Battery,
Assumpsit,
Bail,
Bills of Exchange and Promissory Notes,
Bond,
Bribery,
Charter-Party,
Common,
Contract,
Copyhold,
Copyright,
Covenant,
Deceit,
Demurrage,
Distress,
Dower,
Ejectment,
Escape,
Fences,
Fish and Fishing,
Fixtures,
Franchises,
Freight,
Game,
Gaming,
Guarantee,
Hue and Cry,
Imprisonment,
Insurance,
Interest,
Judgment,
Landlord and Tenant,
Lease,
Legacy,
Libel,
Malicious Arrest,
Malicious Prosecution,
Mortgage,
Nuisance,
Patent,
Perjury,
Post Horse Act,
Post-Office,
Prize and Prize Money,
Replevin,
Sale, Bill of,

I. TO DECLARATIONS, PLEAS, REPLICATIONS, &c.—(*continued*).

Salvage,
Seduction,
Ship and Shipping,
Simony,
Slander,
Tithes,
Tolls,
Trespasses,
Trover,
Use and Occupation,
Wager,
Watercourse,
Way.

II. IN SCIRE FACIAS. See tit. *Scire Facias.*

III. TO INDICTMENT. See tit. *Indictment.*

IV. AS TO THE TIME OF DEMURRING, p. 394.

V. FORM OF.

(*a*) STATEMENT OF THE YEAR, p. 395.

(*b*) OF THE COMMENCEMENT, p. 396.

(*c*) MUST NOT BE TOO LARGE, p. 397.

(*d*) OF THE MARGIN, p. 397.

VI. AS TO WITHDRAWING A DEMURRER, p. 398.

VII. JOINDER IN DEMURRER, p. 399.

VIII. AS TO SIGNING, DELIVERING, AND FILING, p. 400.

IX. AS TO AMENDMENT AFTER, p. 400.

X. AS TO THE EFFECT OF, p. 400.

XI. SETTING ASIDE DEMURRER, p. 401.

XII. OF THE DEMURRER BOOK, p. 402.

XIII. ARGUMENT ON, p. 404.

XIV. JUDGMENT ON, p. 405.

XV. COSTS ON, p. 406.

XVI. WRIT OF INQUIRY ON, p. 406.

IV. AS TO THE TIME OF DEMURRING.

HARRISON *v.* HEATHOM, E. T. 1838. C. P. 4 *Bing. N. S.* 443.

A demurrer is within the rule regulating the Easter vacation.

IN this case the replication was received upon Wednesday, the 11th of April, by the defendant, who struck out the similiter and returned a demurrer on Wednesday, the 18th. By Rule H. T., 2 Will. 4, it is ordered, "That the days between Thursday next before and the Wednesday next after Easter-day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the courts of law at Westminster."

Tindal, C. J.—The 2 Will. 4, c. 39, was enacted after the promulgation of the Rule of Easter Term, 2 Will. 4, and it is consequently

necessary for us to ascertain, whether upon the construction of the statute there is any provision adverse to and inconsistent with the rule. The only section in the statute to which reference can be made is the 11th, and that relates to writs returnable within four days of the end of any term, and provides a remedy for the unreasonable delay which such circumstance occasioned. This, as I have above said, is the legislative provision as to writs returnable upon certain days, but it does not appear to contain any other provision as to the return of other proceedings in the cause; consequently the rule is left untouched, and it therefore remains for us to consider what its meaning is. The words are, it should be recollected, general and unqualified—"that the days between Thursday next before and Wednesday next after Easter-day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the Courts at Westminster." Here, therefore, these days are not to be computed except for two purposes; and the question is, if the present be within one of the exceptions, or if it be one of the ordinary proceedings in a cause. The course of practice was for the plaintiff to deliver the replication with the similiter, and if the replication displeased the defendant he returned it within a reasonable time, and filed or delivered his demurrer. Here the replication was delivered on the 11th of April, and if the demurrer were returned within four days the exigency now contended for would have been satisfied. But the fourth day was the 15th, Easter-day, and those after the 15th were interdicted days, and hence, in my opinion, it follows, that the demurrer could not be delivered upon one of them. The rule should, I think, be discharged without costs; they should be costs in the cause.

LYONS *v.* COHEN, M. T. 1834. Ex. 3 *D. P. C.* 243.

After time to plead, the defendant may demur generally*.

IN debt by drawer against acceptor, the defendant pleaded, after two orders for time to plead, a demurrer in terms; that the declaration was not sufficient in law, and also that an action of debt will not lie, and that the bill should have been stated to be for the value received.

The Court held, that it amounted to a general demurrer, and not frivolous; and that plaintiff was not entitled to sign judgment.

V. FORM OF.

(*a*) STATEMENT OF THE YEAR.

HOLLAND *v.* TEALDI, H. T. 1840. B. C. 8 *D. P. C.* 320.

The demurrer should describe the year to be "in the year of our Lord."

THE demurrer was to the replication, and was intituled "17 Jan. 1840;" omitting the words, "in the year of our Lord;" the objec-

* Where the plaintiff amends the declaration after the defendant has obtained time on the terms of pleading issuably, &c., he may demur specially to the declaration; (*Children* v. *Mannering*, 8 D. P. C. 120); or for good cause to the replication. (*Barker* v. *Gleadow*, T. T. 1836, B. C., 5 D. P. C. 134).

A special demurrer being in the nature of a plea in bar might be adopted after imparlance. (*Pim* v. *Woodman*, 1 D. P. C. 560; S. C. 2 C. & J. 464; S. C. 2 Tyrw. 429). But by Rule H. T., 4 Will. 4, that distinction is abolished.

tion to the demurrer was, that those words were omitted, contrary, as it was said, to 1 Reg. Gen. H. T., 4 Will. 4, (pleading rules), by which it was ordered that every pleading, as well as the declaration, shall be intituled of the day of the month and year where the same was pleaded.

Patteson, J.—I have sent a note to my brother Parke, in order to ascertain whether there was any thing particular in a case which came before him. He says that he recollects the case; and that he granted the application on the ground of a non-compliance with the Rule of H. T., 4 Will. 4, and that he did it deliberately. I must follow his decision in that case, and no doubt the decision was right. A record ought to be more formal than a mere letter between parties. Rule absolute.

(*b*) Of the commencement.

PARRETT NAVIGATION COMPANY *v.* STOWER, E. T. 1840. Ex. 8 *D. P. C.* 405.

A special demurrer commencing, that the "declaration is insufficient in law," is a demurrer to the whole declaration, though it refers to certain counts afterwards.

IN trespass for taking goods, the declaration stated, that the plaintiffs were the proprietors of the Parrett Navigation under certain acts of Parliament, which empowered them, when the tolls were in arrear, to distrain the goods in respect of which such tolls ought to have been paid, or the barge laden therewith, or any other barge or goods belonging to such owner, or to the person from whom the tolls were due, being on the said navigation, or any premises thereunto belonging, and to detain the same till payment of the tolls; and that a certain sum was owing and in arrear for tolls, payable to the plaintiffs, under the said acts, for the transit and conveyance of goods in a certain barge navigated and conducted by the defendants, J. T. and J. M., upon the said navigation. The declaration then stated a demand and refusal of the tolls, a seizure of the barge for a distress, and a seizure by the defendants whilst the plaintiffs' bailiff was about to detain and impound the same. The second count, for pound breach, stated that the plaintiffs had seized a certain barge, then navigated by J. T. and J. M., and certain coals being on the said navigation, as a distress for tolls then in arrear, for the conveyance of certain goods upon the said navigation, and had detained and impounded the said barge and coals, with intent to appraise and sell them, according to the form and effect of the said statutes, whereupon the defendants broke and entered the said pound, and rescued the said barge and coals.

Demurrer.—The defendants say, that the said declaration is insufficient in law, and for causes of demurrer to the first count thereof, &c. The following causes of demurrer, amongst others, were then set forth:—that it did not appear that the barge was goods in respect of which the tolls became due, or was laden therewith, or was the goods of the owner of the first-mentioned goods, or belonged to the person from whom such tolls were due; and that the plaintiffs had not, by their first count, set forth any lawful authority to distrain the said barge. And for causes of demurrer to the said first count, the defendants according, &c. Here followed the causes of demurrer to the second count, which were similar in substance to those urged against the first.

Per Cur.—We think the second count of the declaration is good. It charges the defendants with pound breach, and treats them as wrong-doers; for it states that the plaintiffs had taken their barge and coals for and in the name of a distress. That being the case, the defendants ought not to have taken away the goods so distrained. The first count is clearly bad, as it does not shew that the goods distrained belonged to the persons from whom the tolls were due, or that the plaintiffs had any authority to take them; but as the demurrer is to the entire declaration, the judgment of the Court must be for the plaintiffs.

(*c*) MUST NOT BE TOO LARGE*.

(*d*) OF THE MARGIN†.

BERRIDGE *v.* PRIESTLY, M. T. 1836. Ex. 5 *D. P. C.* 306.—S. P. WHITMORE *v.* NICHOLLS, E. T. 1837. B. C. 5 *D. P. C.* 521.

It is sufficient in the margin to state that the causes are stated in the demurrer.

Gurney, B., at chambers, set aside a demurrer. On the case coming before the Court, it was contended that the learned Judge was justified in setting aside the demurrer, inasmuch as the points intended to be argued were not properly stated in the margin of the demurrer, pursuant to Rule H. T., 4 Will. 4. The statement in the margin was, that "the pleas are bad for the causes specially assigned for demurrer."

Parke, B.—It has been decided in several cases, that such statement in the margin of a demurrer is sufficient. The rule must be absolute.

VERBECKE *v.* PEARSE, T. T. 1838. C. P. 6 *Scott*, 406.—S. P. LINDUS *v.* POUND, E. T. 1837. Ex. 2 *M. & W.* 240; S. C. 5 *D. P. C.* 459.

When a special demurrer.

IN this case the Court said, that special demurrers are within the Rule of H. T., 4 Will. 4, s. 2, which requires the point to be marked in the margin; but in such case the rule will be complied with by a statement, that the points intended to be argued are those stated in the demurrer itself.

ROSS *v.* ROBESON, E. T. 1835. Ex. 3 *D. P. C.* 779.

But a margin, that the matters stated in the plea contained no an-

THE plaintiff demurred, and stated the ground of demurrer in the margin to be, that the matters disclosed in the plea contained no answer to the action. A rule nisi was obtained for setting aside the demurrer book, on the ground of an alleged non-compliance

* Demurrer to several counts for money lent, had, and received, and on an account stated, on the ground that no time was stated:—Held, too large, and set aside as frivolous. (*Jackson* v. *Cawley*, H. T. 1838, Ex., 6 D. P. C. 388).

† By Rule H. T., 4 Will. 4, in the margin of any demurrer, before it is signed by counsel, some matter of law intended to be argued should be stated; and if demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea. By the same rule other points not stated may be argued, provided notice be given.

swer to the declaration, is not sufficient*.

with the rule, which requires that, in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if delivered without, or with a frivolous statement, that it may be set aside as irregular.

Parke, B.—The statement in the margin is merely a repetition of the general demurrer, and would suit any other general demurrer to a plea quite as well. Some special ground ought to have been stated; and if the point intended to be argued is, that the defendant had no right to publish an ex parte statement in a newspaper reflecting on an individual that should have been stated; one point is sufficient. If the plaintiff will undertake to amend the marginal note, the rule may be discharged on payment of costs.

LINDUS *v.* POUND, H. T. 1837. Ex. 2 *M. & W.* 240; S. C. 5 *D. P. C.* 459.

If no margin, the demurrer will be set aside.

IN this case the defendant specifically demurred to a count, on an account stated, for want of the word "then," and delivered a demurrer, stating the cause of the demurrer, but without any marginal note. On a rule to set this demurrer aside as irregular, Rule, Hilary Term, 4 Will. 4, No. 2, was relied on.

Per Cur.—The rule must be absolute. The rule of Court is, that in the margin of *every* demurrer there *shall* be a note.

LACEY *v.* UMBERS, E. T. 1835. Ex. 3 *D. P. C.* 732.

But it is no ground to its being refused argument.

ON demurrer to a plea, the counsel, in support of the plea, objected, that the demurrer could not be argued because the point intended to be raised was not stated in the margin, in pursuance of the new rules.

Parke, B.—That is no objection to the demurrer being argued. The effect of the rule is, that such a demurrer may be set aside as irregular.

VI. AS TO WITHDRAWING A DEMURRER.

CHOLMELEY *v.* PAXTON, E. T. 1825. C. P. 3 *Bing.* 1; S. C. 10 *Moore*, 256.

On a writ of formedon, the demandant was allowed to withdraw his demurrer, and reply.

THIS was a writ of formedon, in which the question turned upon the construction of a power in a will, and which was set up by the defendants in their plea; and as the whole of the power was not recited or set out therein, the plaintiff demurred. On a rule nisi to withdraw the demurrer, and reply on payment of costs—

Per Cur.—We have no doubt but that we have authority to amend, even in writs of right, and although there may have been a delay by the demandant, or his title may rest on a mere dormant claim. Here, however, it is sworn, that the demandant's title only accrued to him in 1822. The amendment must, therefore, be allowed, on the usual terms of paying the costs, and the rule must consequently be made absolute.

* Where the ground of demurrer stated in the margin was sufficient, the Court refused to set aside the demurrer as frivolous. (*Tyndall* v. *Ulleshorne*, M. T. 1834, B. C., 3 D. P. C. 2).

WILSON *v.* TUCKER, T. T. 1833. Ex. 1 *C. & M.* 795; S. C. 3 *Tyrw.* 938; S. C. 2 *D. P. C.* 83.

When demurrer is for delay, it cannot be withdrawn.

A DEFENDANT two days before the end of a term demurred to a declaration for the purpose of gaining time.

The Court will allow the demurrer to be set down for argument on the last day of the term, and the defendant will not be allowed to withdraw the demurrer, and plead the general issue.

VII. JOINDER IN DEMURRER.

BILLING *v.* KIGHTLEY, T. T. 1839. C. P. 5 *Bing. N. S.* 629; S. C. 7 *Scott*, 844.—S. P. MULLINS *v.* COX, T. T. 1839. C. P. 7 *D. P. C.* 660.

A party cannot add the joinder in demurrer, it must be demanded from the other side.

IN this case there was a demurrer, and the plaintiff, without demanding a joinder in demurrer, added the joinder. On motion to set it aside—

The Court held, that the Rule, Hilary Term, 4 Will. 4, dispensed with the rule to join in demurrer, but not with the demand of the joinder.

MULLINS *v.* COX, T. T. 1839. C. P. 7 *D. P. C.* 660.

Formerly it was a four-day rule*.

IN this case—

Per Vaughan, J.—I think that the defendant has four days in which to join in demurrer.

HALL *v.* POPPLEWELL, E. T. 1839. Ex. 5 *M. & W.* 341.

And though a sham demurrer, the four days' demand will not be shortened.

ON motion.—The Court refused to compel a party to join in demurrer before the time allowed by Rule, Hilary Term, 4 Will. 4, although the pleading demurred to was clearly frivolous and for delay.

KENNEY *v.* HUTCHINSON, H. T. 1840. Ex. 8 *D. P. C.* 171; S. C. 6 *M. & W.* 134.

An order for time to join in demurrer must be served within a reasonable time.

THIS was a rule calling upon the plaintiff to shew cause why interlocutory judgment signed in this cause for want of a joinder in demurrer should not be set aside. On the day before that for joining in demurrer, the defendant applied to *Gurney*, B., at chambers, and at five in the afternoon obtained an order for three days' time to join in demurrer. He did not serve this order upon the plaintiff until two o'clock of the following day. The plaintiff, in the mean time, at the opening of the office at eleven o'clock on that day, signed judgment.

Per Cur.—There was ample time to serve this order before the opening of the office. The opposite party was entitled to know whether you intended to waive it or not. The Master tells us, that it ought to be served before the other side can take a step in the

* By Rule H. T., 4 Will. 4, no rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment. By the same rule, to a joinder in demurrer, no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

cause. Here it ought to have been served so long a time before eleven o'clock as the clerk of the plaintiff's attorney would have required to reach the judgment-office at the time of its opening. The rule will be discharged on the defendant swearing to a good defence upon the merits.

JONES *v.* KEY, M. T. 1833. Ex. 2 *C. & M.* 340; S. C. 2 *D. P. C.* 265.

Terms of rejoining gratis do not extend to a joinder in demurrer.

THIS was an action upon the stat. 22 Geo. 3, c. 45, for penalties for allowing a member of the House of Commons to share in a public contract. The defendant being under terms "to plead issuably and rejoin gratis," pleaded several pleas, to some of which the plaintiff demurred, and having demanded a joinder in demurrer, signed judgment for want of a joinder after twenty-four hours had elapsed. *Vaughan*, B., on summons, set aside the judgment for irregularity. On motion to the Court—

Per Cur.—The Master thinks that rejoining gratis only applies to those cases in which the defendant goes to the country. Where there is a disputed fact, the parties must go to issue; but on demurrer, the defendant may require time, and may wish to consult counsel, to see whether there is any foundation for the demurrer. The word "rejoin" is well understood, and you cannot apply it to a joinder in demurrer.—Rule refused.

VIII. AS TO SIGNING, DELIVERING, AND FILING*.

IX. AS TO AMENDMENT AFTER†. See also tit. *Amendment.*

X. AS TO THE EFFECT OF‡.

* By Rule H. T., 4 Will. 4, no demurrer shall in any case be filed with the officer of the Court, but the same shall always be delivered between the parties. All demurrers, whether general or special, must be signed by counsel in the King's Bench; (Per Cur. T. T., 21 Geo. 3, K. B.); or a serjeant in the Common Pleas. (*Douglas* v. *Child*, E. T., 33 Geo. 3, C. P.)

† Where a plaintiff obtains an order to amend his declaration, to which the defendant has demurred, and the latter at the same time obtains an order for time to plead, that time must be calculated from the time that the plaintiff amends, and not from the date of the order for time, although the latter order does not refer to the former. (*Davies* v. *Stanley*, E. T. 1840, B. C., 8 D. P. C. 433). The Court will allow amendments, upon payment of costs, after demurrer joined, where the pleadings are in paper. (*Godolphin* v. *Tudor*, M. T. 1703, K. B., 6 Mod. 38, 234; S. C. 2 Salk. 468; S. C. 3 Id. 251).

‡ Facts stated in a plea which was held bad on demurrer cannot be used as an admission on record of any facts stated in it; as, to prove partnership. (*Firmin* v. *Crucifix*, T. T. 1831, N. P., 5 C. & P. 98).

Where one of several pleas is demurred to, and issue taken on others:—Held, that, notwithstanding the venire to assess damages in the former, the plaintiff is not entitled to advert, at the trial, to the matters in the plea, and admitted by the demurrer. (*Ingram* v. *Lawson*, 2 M. & Rob. 253).

XI. SETTING ASIDE DEMURRERS.

CRESWELL *v.* CRISP, E. T. 1834. Ex. 2 *D. P. C.* 635; S. C. 4 *Tyrw.* 991.

ON demurrer to the declaration, it was stated in the margin of the demurrer book, that the matter of law intended to be relied upon was, that the action was an action of debt on a note by the payee against the maker; but it did not appear that the note was expressed to be for value received, or any thing equivalent thereto, and, therefore, that debt would not lie. On motion to set aside the demurrer as frivolous—

A demurrer to debt on a note for the omission of the words "value received," is not frivolous*.

Per Cur.—We cannot set aside the demurrer. We cannot determine the point of law on motion.

CHEVERS *v.* PARKINGTON, M. T. 1837. C. P. 6 *D. P. C.* 75.

IN an action by indorsee against drawer of a bill of exchange, the declaration contained a count on the bill and on an account stated, with one promise to pay the last-mentioned several monies on request. The defendant having specially demurred, on the ground that there was no promise to the count on the bill, the Court set aside the demurrer as frivolous.

But, in an action by indorsee against drawer, the declaration contained one count on the note and an account stated, with only one promise; demurrer, because there was no promise to pay the note, set aside as frivolous.

Parke, J.—If there was the least ground for argument, the defendant should have the benefit of it; but as the declaration contains but one sum, besides the amount of this bill, the promise in terms applies to both counts.—The rule must be absolute.

UNDERSHELL *v.* FULLER, H. T. 1835. Ex. 1 *C., M. & R.* 900; S. C. 5 *Tyrw.* 392.

A DECLARATION stated a promise to the plaintiff and A. B., now deceased, in his lifetime, and in a second count stated that the defendant was indebted to the plaintiff and the said A. B. in his lifetime, but did not aver that he was deceased. The defendant having demurred to the second count—

So, where one count stated the word "deceased" and another omitted the word "deceased," a demurrer on that ground is frivolous.

The Court expressing a clear opinion that the matter in the demurrer and margin was frivolous, the defendant, on an affidavit of merits, obtained leave to amend upon payment of the costs of the demurrer and of the application.

NANNEY *v.* KENRICK, M. T. 1832. Ex. 1 *D. P. C.* 609.

THE declaration contained several counts, and was demurred to specially. The plaintiff having signed judgment for want of a plea—

But a special demurrer, although frivolous, is not necessarily a nullity.

Bayley, B.—A special demurrer is not an issuable plea; but if there are good grounds, the Court will sometimes strike out the causes.—Rule absolute for setting aside the judgment.

* The rule to set aside a demurrer as frivolous must be drawn up on reading the plea, as well as subsequent proceedings. (*Hamer* v. *Anderton*, M. T. 1840, B. C., 9 D. P. C. 119).

DAWSON *v.* PARRY, M. T. 1838. C. P. 6 *Scott*, 890.

But the Court will order it to be placed at head of paper.

IN this case there was a demurrer, not absolutely frivolous, but evidently for the purpose of gaining time.

The Court ordered it to be taken out of its turn and placed at the head of the paper.

KINNEAR *v.* KEANE, M. T. 1834. Ex. 3 *D. P. C.* 154.

A demurrer, clearly frivolous, to be set aside unless cause be shewn by a certain day;

DECLARATION in this cause was against the drawer of a bill of exchange in the common form; to this a demurrer was put in, stating several causes of demurrer, for which there was evidently no foundation; and in the margin was inserted a notice, stating that the grounds of demurrer were those assigned.

Per Cur.—Take a rule that the demurrer be set aside as irregular, unless cause be shewn on Thursday next.

UNDERHILL *v.* HARVEY, H. T. 1835. Ex. 3 *D. P. C.* 495.

or may be withdrawn on terms.

A FRIVOLOUS demurrer was pleaded too late to get it set down for argument in the term; upon a motion to set it aside—

The Court allowed the defendant to withdraw it only on terms of an affidavit of merits, pleading instanter, and paying the costs of the application and of the demurrer.

NORTON *v.* MACKINTOSH, H. T. 1839. B. C. 7 *D. P. C.* 529.

Too late to set aside a demurrer as frivolous after notice of trial given on issues in fact.

THE plaintiff joined in demurrer, and gave notice to try certain issues in fact which had been joined on the record at the sittings in London. The plaintiff obtained a rule for setting aside the demurrer as frivolous.

Patteson, J.—After the plaintiff had joined in demurrer, whether the demurrer was frivolous or not, he could not apply to set it aside, more particularly when he had given notice of trial of the issues in fact.

HOWORTH *v.* HUBBERSTY, H. T. 1835. Ex. 3 *D. P. C.* 455; S. C. 5 *Tyrw.* 391.

A rule for setting aside a frivolous demurrer must be drawn up on reading the pleadings.

ON a rule to set aside a demurrer, it was stated in support of the rule, that the objection sufficiently appeared on the pleadings; but it was stated that the rule had been drawn up on reading the affidavit only, and—

The Court, holding that they could not look at the record, discharged the rule without costs.

XII. OF THE DEMURRER BOOK*.

RULE H. T. 1828. K. B., C. P. & Ex. 7 *B. & C.* 642.—S. R. 4 *Bing.* 549.—S. R. 1 *M. & R.* 662.—S. R. 1 *M. & P.* 401.—S. R. 2 *Y. & J.* 430.

Only those parts of the

BY this Rule, after reciting that great expense is often unnecessarily incurred in making up demurrer books, from setting forth those

* By Rule H. T., 4 Will. 4, demurrer book shall on all occasions be made up by the suitor, or his attorney or agent, as the case may be, and not as heretofore by any officer of the Court.

parts of the pleadings to which the demurrers do not apply,—it is ordered, that, from and after the end of this present Hilary Term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied therein the prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client.

pleadings to which the demurrer refers should be set out in the demurrer book.

HARRISON *v.* RICHARDSON, H. T. 1825. Ex. 1 *M'Clel. & Y.* 246.

THE defendant having pleaded a sham plea demurred to the plaintiff's replication merely for delay; the plaintiff obtained a rule for a concilium† for the last day of term, without previously giving a four-day rule to bring in the demurrer books.

The four-day rule to bring in the demurrer books does not apply to a sham demurrer*.

The Court refused to set aside the rule for the concilium, but gave judgment for the plaintiff.

DARKER *v.* DARKER, T. T. 1833. Ex. 2 *D. P. C.* 88.

IT was contended that paper-books had not been delivered in proper time. They were not delivered till late on Saturday, and that was contended to be too late for an argument on the next Monday morning.

But the delivery of books on Saturday too late for Monday.

The Court observed, that the rule respecting the delivery of paper-books was one of great convenience and importance, and must be strictly enforced. The case would not therefore be heard.

ABRAHAM *v.* COOK, M. T. 1834. Ex. 3 *D. P. C.* 215.

THE paper-books for the plaintiff were delivered, but those for the defendant had not been delivered. *Parke*, B., ordered the case to be struck out.

Unless the four books are delivered the demurrer will be struck out.

Per Cur.—Where one party has delivered all the books he is entitled to judgment; but where he has only delivered his own, and the other party has not delivered any, the case must be struck out. He should have delivered all the books; and the case must be set down again.

REG. GEN. H. T. 1831. 1 *D. P. C.* 80.

PATTESON, J., stated, that the Judges of the King's Bench had agreed with respect to the delivery of paper-books, that it would only be necessary for the future to deliver them to the Lord Chief Justice and the three senior puisne Judges sitting in that Court. If the fifth Judge should require them, he would obtain them from one of the other Judges, as might be managed between them.

They are to be delivered to the chief and three other Judges.

SANDALL *v.* BENNETT, M. T. 1834. K. B. 4 *N. & M.* 89; S. C. 1 *Ad. & E.* 204.

PLEA.—That the action is brought for 40*s.*, and that the defendant resided in Middlesex, and was liable to be summoned in the county court. On demurrer it was alleged by affidavit, that a party

Without notice, the non-payment of costs of

* By Rule H. T., 4 Will. 4, four clear days before the day appointed for argument, the plaintiff and defendant shall deliver copies of the demurrer book.

† Concilium abolished. (See post, p. 404, n.).

the demurrer books is no ground for refusing to hear the argument*.

had made default in delivering a demurrer book in time; and it appeared that both parties had delivered demurrer books to the same Judges. In order to entitle one party to insist on the costs being paid or deposited with the clerk of the rules, before the adverse party could be heard, pursuant to Rule 14, Hil. Term, 4 Will. 4—

The Court held, that, with respect to costs, the adverse party must have notice and an opportunity of answering the affidavit; but it was no ground for refusing to hear argument.

SCOTT *v.* ROBSON, E. T. 1835. Ex. 2 *C., M. & R.* 29.

If defendant does not deliver demurrer books, but offers a cognovit, the plaintiff will have judgment.

THE defendant had neglected to deliver his demurrer books, and did not appear at the argument to support his pleadings, but had offered to give a cognovit.

The Court gave judgment for the plaintiff, without requiring delivery of the defendant's demurrer books.

XIII. ARGUMENT ON†.

HARVEY *v.* KING, E. T. 1835. Ex. 3 *D. P. C.* 730.

It has been suggested, that in future two lists, one for argument, the other not, should be made‡.

LORD *Abinger*, C. B.—I think it would be better in future, that, where a case is not intended to be argued, it should be mentioned to the officer, and that he should make out two lists, as there are in the King's Bench; one of those cases which are intended to be argued, and the other of those where no argument is intended.

BRITTEN *v.* BRITTEN, M. T. 1833. Ex. 2 *D. P. C.* 239.

Demurrer not allowed to be argued, when for delay, if concilium moved for too late§.

THE concilium was served so late that the opposite party had not time to prepare and deliver the demurrer books two days before the day for argument.

The Court refused to allow the demurrer to be argued, though it was stated to be a plea pleaded for delay; and the defendant will be entitled to his costs for appearing to make the objection.

FLIGHT *v.* GLOSSOP, T. T. 1835. C. P. 4 *D. P. C.* 135.

Bankruptcy of defendant no

AFTER the setting down the demurrer in this cause for argument, and the delivery of the demurrer books, the defendant became bank-

* To entitle a party to the costs of delivering copies of the demurrer books, in default by the other party, he is bound to deliver them on the day following that on which the party making default ought to have done so. (*Fisher* v. *Snow*, M. T. 1834, B. C., 3 D. P. C. 27).

† By Rule H. T., 4 Will. 4, no motion or rule for a concilium shall be required, but demurrers shall be set down for argument at the request of either party, with the clerk of the rules in the K. B. and Exchequer, and secondary in the C. P., upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party.

‡ A demurrer cannot be argued the last day of term. (*Milner* v. *Horton*, 1 M'Clell. & Y. 493).

§ This case was before Rule H. T., 4 Will. 4, supra.
Where there are not a sufficient number of days remaining of the term to enable a party to conform to the practice of the Court, and the demurrer is clearly for delay, the Court allowed the concilium to be drawn up for the last day. (*Cooper* v. *Hawkes*, M. T. 1830, Ex., 1 C. & J. 219).

rupt. The plaintiff moved for leave to strike the cause out of the demurrer paper.

ground for striking demurrer out of paper.

Per Cur.—It would certainly be a great hardship on the defendant, who wishes the demurrer to be argued, if we permitted the plaintiff, the moving party, to withdraw at this late hour, quia timet. In the absence of a precedent to warrant it, the rule must be discharged, but without costs.

BAYLEY *v.* HOMAN, E. T. 1836. C. P. 3 *Scott*, 384; S. C. 3 *Bing. N. S.* 915.

Upon a demurrer the opposite pleadings cannot be objected to unless marked for argument.

UPON demurrer to a replication—

The Court held, that the plea could not be attacked upon a point not marked for argument.

XIV. JUDGMENT ON*.

WAINWRIGHT *v.* JOHNSON, M. T. 1836. Ex. 5 *D. P. C.* 317. —S. P. BOYDELL *v.* JONES, 4 *M. & W.* 210.

If the demurrer be too large the plaintiff is entitled to judgment.

THE defendant demurred specially, assigning for cause, that the promise in the declaration was not laid according to the form prescribed by the Rules of Trinity Term, 1 Will. 4; and also, that it appeared on the face of the declaration that the cause of action had accrued after the writ issued.

Parke, B.—That is a valid objection, but the demurrer is too large; it should have been confined to the first count only. Therefore we must give judgment for the plaintiff generally.

WEBB *v.* BAKER, H. T. 1837. Q. B. 3 *N. & P.* 87.

As, if a demurrer be to the whole declaration, and one count be good, the plaintiff will be entitled to judgment.

DEMURRER. One count was on an account stated: it did not aver the time when it was stated—

But the Court said, as the demurrer was to the whole declaration, which contained several counts, one count being good, the plaintiff was entitled to judgment.

COMMELIN *v.* THOMPSON, E. T. 1831. Ex. 1 *C. & J.* 461; S. C. 2 *Tyrw.* 346.

Judgment cannot be moved for until demurrer books are delivered on both sides.

MOTION for judgment on a demurrer for the plaintiff; but the Court refused the application because the demurrer books had not been delivered by the defendant to the two junior Barons, on a subsequent day, the plaintiff having in the mean time delivered the demurrer books to the junior Barons on the behalf of the defendant. The motion was granted.

ATKINSON *v.* BAYNTUN, E. T. 1835. Ex. 1 *Bing. N. S.* 740.

After judgment on demurrer a

AFTER demurrer by defendant to plaintiff's replication, and argument and judgment against the defendant, he applied to a Judge at

* Where judgment passed for the plaintiff on a demurrer to one plea, and the cause was taken down for trial upon another, and a juror was then withdrawn by consent:—Held, that the plaintiff could not obtain the costs of the demurrer. (*Burdon* v. *Flower*, T. T. 1839, B. C., 7 D. P. C. 786).

plea was allowed to be amended on newly discovered facts.

chambers, and, on an affidavit that new and important matter had come to his knowledge, obtained an order to amend.

The Court, after some hesitation, discharged a rule to rescind such order; at the same time they expressed an opinion that the course pursued by the defendant was irregular, as he should have applied to amend before argument and judgment against him.

DELEGAL *v.* HIGHLEY, M. T. 1837. C. P. 6 *D. P. C.* 194; S. C. 4 *Bing. N. S.* 114; S. C. 3 *Scott*, 394.

But, after judgment on demurrer to some pleas, the Court will not allow the replication to other pleas to be withdrawn in order to demur to them also.

A PLAINTIFF demurred to certain pleas to the second count in his declaration, and replied to the pleas to the third count, and finding, upon judgment being pronounced in his favour on the demurrer, that the plea to which he had replied was liable to the same objection in substance as those which had been declared bad, applied to the Court to be allowed to strike out the first count of his declaration to which the general issue had been pleaded, and the replication to the plea to the third count, and to substitute a demurrer in place of such replication.

The Court refused the application, inasmuch as the plaintiff had it in his own power to attain the desired object without their interference, by entering a nolle prosequi to the first and third counts.

TAYLOR *v.* MURRAY, M. T. 1837. Ex. 6 *D. P. C.* 80; S. C. 3 *M. & W.* 141.

A demurrer is not within R. M. T. 1 W. 4, as to delivery of bill of costs at time of service of taxation.

ON a rule to shew cause why the judgment should not be set aside for irregularity. The objection was, that the plaintiff had not delivered a copy of the bill of costs pursuant to the tenth Rule of this Court, of Michaelmas Term, 1 Will. 4. The Rule is, "That one day's previous notice of the time of taxing costs upon rules, orders, town posteas and inquisitions, and a copy of the bill of costs and affidavit to increase, shall be given by the attorney of the party whose costs are to be taxed to the attorney of the other party at the time of service of such notice."

The Court refused to set aside a judgment on demurrer for irregularity because no bill had been delivered, but referred the bill to be retaxed; the party to refund if he had been allowed too much.

XV. COSTS ON*.

XVI. WRIT OF INQUIRY ON. See post, tit. *Inquiry, Writ of.*

* Where, there being issues in fact and in law after demurrer, and an amendment allowed on payment of costs:—Held, that the Master had properly disallowed the costs of making up the issues in fact, which would be costs in the cause. (*Jones v. Roberts*, 4 Tyrw. 310).

Deposit in Lieu of Bail*.

I. RELATIVE TO WHAT KIND OF BAIL THE STATUTE APPLIES, p. 407.

II. OF THE NOTICE OF THE DEPOSIT TO REMAIN IN LIEU OF BAIL, p. 408.

III. OF THE DEPOSIT OF THE COSTS, p. 409.

IV. EFFECT OF, p. 409.

V. UNDER WHAT CIRCUMSTANCES, AND BY WHOM, TO BE TAKEN OUT OF COURT.

(*a*) By the plaintiff, p. 410.

(*b*) By the defendant, p. 411.

(*c*) By third persons, p. 413.

(*d*) Rule for, p. 413.

(*e*) Motion for, when to be made, p. 413.

VI. OF STRIKING THE SUM PAID INTO COURT OUT OF THE DECLARATION, p. 414.

VII. OF THE POWER OF THE COURT OVER THE SUM PAID IN, p. 414.

VIII. COSTS CONNECTED WITH, p. 415.

I. RELATIVE TO WHAT KIND OF BAIL THE STATUTE APPLIES.

Collins *v.* Gwynne, T. T. 1832. C. P. *2 M. & Scott, 775.*

On motion for leave to deposit money in Court in lieu of bail in error—

Bail in error are not within the statutes authorizing a deposit in lieu of bail.

The Court said, the statutes as to a deposit in lieu of bail did not apply to bail in error, and could only be done by consent.

* The 7 & 8 Geo. 4, c. 71, after reciting the 43 Geo. 3, c. 43, enacts, "That in all cases in which any defendant shall have been discharged from arrest, upon producing such deposit as is required by the said recited act, and the sum so deposited shall have been paid into Court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the Court, to allow the sum so deposited with the sheriff, and by him paid into Court as aforesaid, together with the additional sum of 10*l.*, to be paid into Court by such defendant, as a further security for the costs of the action, to remain in Court to abide the event of the suit; and in all cases where any defendant shall have been arrested and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court the sum indorsed upon the writ, together with the amount of the King's fine, if any, upon the original writ, and a further sum

MORGAN *v.* PEDLER, H. T. 1836. C. P. 4 *D. P. C.* 645.

So, it seems, with respect to causes removed from an inferior court.

THE action had been commenced in an inferior court without process against the person, and afterwards removed. On motion for leave to deposit money in lieu of bail under the 7 & 8 Geo. 4—

The Court doubted whether this was a case within the statute, and recommended the plaintiff's counsel to advise his client to consent to the money being paid into Court.

II. OF THE NOTICE OF THE DEPOSIT TO REMAIN IN LIEU OF BAIL.

ROWE *v.* SOFTLY, T.T.1830. C.P. 6 *Bing.* 634; S.C. 4 *M. & P.* 464.

Notice that the sum deposited in lieu of bail under 7 & 8 Geo. 4, c. 7, remains in Court to abide the event, may be given the day on which the time for putting in bail expires.

THE defendant in this case was arrested on the 8th of May, whereupon he put into the hands of the sheriff the amount of the debt sought to be recovered, together with 10*l.* for costs, pursuant to the stat. 7 & 8 Geo. 4, c. 7, and on the 17th the sheriff paid the money into Court. The time for putting in special bail expired on the 14th, no bail having been put in. On a rule nisi for taking the money out of Court on the same day, the defendant gave notice of his intention to allow the sum so deposited with the sheriff, and by him paid into Court, together with the additional sum of 10*l.* as a further security for the costs of the action, to remain in Court to abide the event of the suit, pursuant to the second section of the statute.

Per Cur.—The question is, whether the defendant has given timely notice of his intention to avail himself of the alternative allowed by the act, he not having done so until the day next before that on which, according to the course of practice, special bail should have been perfected. It appears to us, that the words here used, "instead of *putting in and perfecting* special bail in the action," comprehend the whole time in which bail may be put in and perfected—that is, until the time for perfecting has expired. The intention of the act was to benefit the defendant. The plaintiff

of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit; and thereupon the said defendant may, and he is thereby required to, enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action according to the course of the said Court, or, in default thereof, the plaintiff in the action is hereby empowered to enter such common appearance, or file common bail for the said defendant, and the cause may proceed as if the defendant had put in and perfected special bail; and in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive the said money so remaining in, or so deposited or paid into, the Court, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application; and if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit, or be otherwise barred, or in case the sum deposited and paid into Court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into Court, or so much thereof as shall remain, shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant.

Defendant may receive such deposit and payment out of Court upon perfecting special bail. Defendant, after perfecting bail, may make deposit and payment, and file common bail.

does not suffer any delay by this construction; for, until the bail is perfected, he could not declare in chief. It was never intended that the money should be taken out of Court; it was meant to remain in Court as a stake. On the whole, we think the defendant, not being obliged to perfect bail until the 18th, had till the expiration of that day to avail himself of the provisions of the act.

III. OF THE DEPOSIT OF THE COSTS.

STRAFORD *v.* LOVE, E. T. 1835. B. C. 3 *D. P. C.* 593.

So, the 10*l.* extra for costs need not be deposited until the last day for perfecting bail.

THE defendant was arrested by virtue of a writ of capias on the 7th of March, and the sum sought to be recovered, together with 10*l.* for costs, was paid into the sheriff's hands. Pursuant to the command contained in the writ of capias, bail *ought* to have been put in on the 14th. The 15th was a Sunday, and the plaintiff would not be able to except until the Monday. He, therefore, could not compel a justification at the earliest until the 18th. The time for perfecting bail must consequently be taken to have been on the 18th. On that day, the defendant's attorney sent a letter to the plaintiff's attorney, proposing terms of arrangement between the parties. A correspondence then continued down to the 24th, when a letter was sent by the plaintiff's attorney, breaking off all further communication on the subject. On that day the defendant paid into Court the additional 10*l.* mentioned in the 7 & 8 Geo. 4, c. 71, s. 2, to meet the further costs in the suit, the sheriff in the meantime having paid in the deposit.

Per Williams, J.—If, instead of putting in bail, a defendant deposits the amount of the debt, with 10*l.* for costs, pursuant to the 43 Geo. 3, c. 46, s. 2, he is not bound to pay in the additional 10*l.*, pursuant to the 7 & 8 Geo. 4, c. 71, s. 2, until the last day allowed for perfecting special bail.

IV. EFFECT OF.

GREEN *v.* GLASSHOOK, E. T. 1835. C. P. 1 *Bing. N. S.* 516; S. C. 1 *Scott*, 402.

Money deposited under a protest as to the sufficiency of the affidavit of debt; after appearance, no objection can be raised as to the affidavit*.

THE defendant, upon being arrested, instead of putting in special bail, paid the amount of the debt and 20*l.* as a security for the costs of the action into Court under the 7 & 8 Geo. 4, c. 71, s. 2. The defendant, at the time of the arrest, alleged that the affidavit to hold to bail was defective, and paid the money without prejudice.

Per Cur.—The statute 7 & 8 Geo. 4, c. 71, is a very beneficial act for the defendant who chances to be arrested. Here the party has made his option, and instead of putting in special bail, he has paid the money into Court. He must, therefore, take this act with

* A party depositing money with the sheriff in lieu of bail cannot demand a declaration until the money is actually paid in, although the sheriff has returned that he has paid it in, and the plaintiff consented to his entering a common appearance, and making a further deposit under 7 & 8 Geo. 4, c. 71, s. 1. (*Hall* v.

all the circumstances which follow from it, and, amongst others, that of entering a common appearance, in the same manner as if he had given bail. The objection to the affidavit is clearly waived.

V. UNDER WHAT CIRCUMSTANCES, AND BY WHOM, TO BE TAKEN OUT OF COURT.

(*a*) By the plaintiff.

HANNAH *v.* WILLIS, E. T. 1838. C. P. 6 *D. P. C.* 417; S. C. 4 *Bing. N. S.* 310.

A deposit in lieu of bail after the time of putting in has expired, is not equivalent to putting in and perfecting bail, and therefore the plaintiff is entitled to the money*,

ON a rule to take money deposited out of Court, it appeared that the defendant, upon being arrested, paid the sum indorsed upon the writ, and 10*l.* besides, to the sheriff under the 43 Geo. 3, c. 46, s. 2, and before the expiration of the eighth day (the time allowed him to put in bail to the action) tendered the additional 10*l.*, under the 7 & 8 Geo. 4, c. 71, s. 2, to the officer of the Court, to abide the event, which the officer refused to accept, upon the ground that the sum sworn to and the 10*l.* given to the sheriff had not been lodged in Court, and these latter sums were not in fact lodged in Court until the ninth day from the arrest, when the additional 10*l.* were also paid in.

The Court held, that the plaintiff was entitled to take the money out of Court, the defendant's remedy being against the sheriff.

FREEMAN *v.* PAGANINI, H. T. 1834. C. P. 2 *D. P. C.* 776; S. C. 4 *M. & Scott*, 165.

and the costs of the application.

AFTER verdict to take money out of Court paid in by the defendant in lieu of special bail. The question was, whether the plaintiff was entitled to the costs of the application? Mr. Chapman, in his Practice, p. 137, said that it was the practice in the King's Bench to allow such costs.

Per Cur.—It is consistent with justice that he should have those costs.

Champneys, 4 Dowl. P. C. 713). And where the action for a false return was brought against the sheriff:—Held, that he might still pay it in with the view of reducing the damages, and if the action were discontinued he must pay the costs.

* A plaintiff is not entitled to receive out of Court money paid in by a defendant in lieu of bail under the 7 & 8 Geo. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. (*Johnson* v. *Wall*, M. T. 1835, B. C., 4 D. P. C. 315). In *Hunt* v. *M'Lachlan*, (7 D. P. C. 708), it was decided, that where a defendant had gone abroad after depositing money in lieu of bail, pursuant to 43 Geo. 3, c. 46, s. 2, without putting in and perfecting bail in due time, and it does not appear that the defendant has a residence in this country, or employed an attorney in the action, the plaintiff may take the money out of Court after serving his rule on the sheriff, and putting it up in the Queen's Bench office.

Where money had been deposited with the sheriff, and since brought into Court under 43 Geo. 3, c. 46, s. 2, and the tender being too late, the plaintiff applied to have it paid over to him:—Held, that there being no affidavit of merits, he was, by analogy to the application to stay proceedings on the bail-bond, entitled to receive it. (*Newman* v. *Hodgson*, 2 B. & Ad. 422).

(*b*) By the defendant*.

GEACH *v.* COPPIN, M. T. 1834. B. C. 3 *D. P. C.* 74.

To entitle a defendant to a return of his deposit in lieu of bail, he must have perfected bail in time, but the plaintiff must elect between the money and the bail.

ON motion for taking a sum of money out of Court, which had been deposited in the hands of the sheriff under the 43 Geo. 3, c. 46, in lieu of bail, and afterwards paid into Court by him, on the ground of the defendant having perfected special bail.

Littledale, J., held, that if a defendant deposits money in the hands of the sheriff pursuant to the 43 Geo. 3, which is paid into Court, the defendant will not be allowed to take it out unless he has put in bail according to the exigency of the capias, although such a deposit is not mentioned in the warning attached to the writ; if however bail has been perfected, but not in due time before the plaintiff takes the money out, he must make his election as to which security he will take.

YOUNG *v.* MALTBY, E. T. 1835. B. C. 3 *D. P. C.* 604.

An affidavit by the defendant that bail was justified, is sufficient to entitle him to take the money out of Court, unless there be a counter affidavit that it was not justified in time.

ON shewing cause against a rule for the purpose of taking out of Court a sum of 40*l.* and 10*l.* for costs, which had been deposited in lieu of bail pursuant to the 43 Geo. 3, c. 46, special bail having been justified, the affidavit on which the application was founded was contended to be defective; because, although it stated that bail had been justified, it did not go on to shew that it had been justified in due time.

Williams, J.—If having been sworn that bail was justified, I must presume that it was justified in due time, unless an affidavit be produced on the part of the plaintiff shewing that it was not.

PITT *v.* COOMBS, H. T. 1835. K. B. 4 *N. & M.* 535.

A party who makes his deposit being privileged from arrest is entitled to have it returned.

THE plaintiff, a solicitor, being arrested under a ca. sa., applied to a Judge to discharge him, on the ground that he was privileged at the time of the arrest. The Judge thought that the plaintiff's privilege had ceased, but made an order for his discharge upon payment into court of the 42*l.* 10*s.*, and also 5*l.* for costs. The plaintiff paid the 47*l.* 10*s.* into court, and was thereupon discharged in pursuance of the order. On motion by the plaintiff to take the money out of court—

The Court held, that where a party arrested whilst privileged

* The defendant having been arrested under a capias issued by the authority of a Judge under the 1 & 2 Vict. c. 110, paid money into the hands of the proper officer under the 43 Geo. 3, c. 46, s. 2. He subsequently put in special bail, to whom an exception was made, and the defendant then rendered:—Held, that the putting in bail and the render of the defendant was equivalent to an appearance, for the purpose of an application to pay the money out of Court to the defendant. (*Brooke* v. *Gunning*, M. T. 1839, 8 Dowl. P. C. 11; 6 Bing. N. C. 137; 8 Scott, 343).

On an application under the 7 & 8 Geo. 4, c. 71, s. 2, to take money and costs out of Court which have been deposited in lieu of bail, if the cause is in such a state that issue may be joined before the rule is disposed of, the Court will grant it with a stay of proceedings. (*Bloor* v. *Cox*, H. T. 1838, B. C., 6 Dowl. P. C. 266).

Money having been deposited in lieu of bail, and an order for better particulars with a stay of proceedings having remained unobeyed for a year, the Court refused to grant a rule for taking the money out of Court. (*Horden* v. *Harbourn*, H. T. 1839, B. C., 7 D. P. C. 546).

from arrest, pays money into Court by permission of a Judge in order to obtain his discharge, he is entitled upon application to the Court to have the money restored to him. But such application must be made within a reasonable time after the arrest, or the delay must be satisfactorily accounted for.

ROSSET *v.* HARTLEY, M. T. 1835. K. B. 5 *N. & M.* 415; S. C. 7 *Ad. & E.* 523.

But, an omission of one of the defendant's Christian names in the writ is no ground for the return of the deposit.

THE sheriff paid the money into Court under 43 Geo. 3, c. 46, s. 2. Bail above not having been put in, the plaintiff made the usual motion in the Bail Court to take the money out of Court, and a rule nisi was obtained, which afterwards, upon argument before the same learned Judge, was discharged on the authority of *Eastby* v. *Parsons*, (5 Taunt. 623). The plaintiff afterwards obtained a rule nisi to take the money out of Court, on affidavits stating circumstances to shew that the plaintiff had used due diligence in endeavouring to discover the defendant's name, in order to bring the case within the Rule of Hilary Term, 2 Will. 4, r. 32, and that the former decision ought not to be final.

Per Cur.—We cannot say that reasonable diligence was not used to ascertain the defendant's name, and therefore the case falls within the rule. Rule discharged.

HARRISON *v.* DICKINSON, M. T. 1838. Ex. 4 *M. & W.* 355; S. C. 7 *D. P. C.* 6.

So, where a party goes into custody under 1 & 2 Vict. c. 110, he is not entitled to have the money deposited returned to him.

UPON the 4th of September, 1838, the defendant was arrested upon mesne process, and deposited the amount of the debt and 10*l.* for costs with the sheriff in lieu of bail, and before the 1st of October an additional sum was paid into Court in lieu of special bail.

The Court held, that, upon rendering to prison after the 1st October, and entering a common appearance, he was not entitled to have the money deposited paid out to him under the statute 1 & 2 Vict. c. 110.

FERRALL *v.* ALEXANDER, M. T. 1831. B. C. 1 *D. P. C.* 132.

The application to take the money out by the defendant is too late after issue joined; and if the defendant becomes bankrupt before trial the money passes to his assignees.

AFTER a rule to pay money into Court in lieu of bail under 7 & 8 Geo. 4, c. 71, s. 2, the application on the part of the defendant to take it out was not made until after issue joined.

The Court held, 1st, that it was too late; and the defendant having after issued joined and before trial become bankrupt, the money being bound, the assignees were bound. And 2nd, that money so paid in could not be deemed a payment to a creditor, so as to be protected within s. 81 of 6 Geo. 4, c. 16; and that neither the plaintiff nor the assignees being entitled, the Court might exercise its equitable discretion and order it to be paid to the assignees, and having referred it to be ascertained that the payment was after the act of bankruptcy, the rule was made absolute, the assignees paying costs of the application.

(*c*) By third persons.

BULL *v.* TURNER, H. T. 1836. Ex. 4 *D. P. C.* 734; S. C. 1 *M. & W.* 47.

A third person who deposits money in lieu of bail is not entitled to take it out though the defendant renders,

ONE of the bail to the sheriff paid a sum of money into Court instead of putting in bail to the action, and the plaintiff having recovered a judgment the defendant rendered to prison.

Parke, B.—This money was paid in in lieu of bail to the action; it must be taken to have been paid in under the statute, and the same effect must be given to it as if it had been paid in by the party himself. When once the money gets into Court, it remains there until the plaintiff or defendant obtains judgment, and then it is to be paid out to the party actually entitled to it.

DOUGLASS *v.* STANHOUGH, T. T. 1832. K. B. 3 *Ad. & E.* 316.

unless the defendant appears in Court and consents.

THE friend of the defendant arrested made a deposit of his own money on the defendant's behalf in lieu of bail, and the sum was afterwards paid into Court to abide the event of the suit. The defendant subsequently rendered. The owner of the money applied to have it restored to him under stat. 7 & 8 Geo. 4, c. 71, s. 5.

The Court held he was entitled to it if the defendant appeared in Court and assented. For this purpose, the render is equivalent to putting in and perfecting special bail.

(*d*) Rule for*.

GRANT *v.* WILLIS, H. T. 1836. B. C. 4 *D. P. C.* 581.

The rule to take out of Court money deposited in lieu of bail is only nisi.

ON an application to take money out of Court under 7 & 8 Geo. 4, c. 71, the plaintiff having been nonsuited. The only question was, whether the rule ought to be absolute or nisi in the first instance.

Patteson, J., (after consulting with Mr. Hill, the clerk of the rules), was of opinion, that the rule must be nisi in the first instance.

(*e*) Motion for, when to be made†.

* Where money has been paid into Court pursuant to the 7 & 8 Geo. 4, c. 71, and a rule for judgment as in case of a nonsuit is moved for, the Court will not add to that rule an application to take the money out of Court, but that must be the subject of a separate rule, after the former has been decided. (See *De Bedolliere* v. *Ryan*, E. T., 1819, B. C., 7 Dowl. P. C. 615).

Where a defendant has deposited money in Court pursuant to 7 & 8 Geo. 4, c. 71, s. 2, to abide the event of the suit, and he succeeds, the rule for taking the money out of Court is nisi in the first instance. (*Lover* v. *Tolmin*, H. T. 1836, B. C., 5 D. P. C. 388).

† Where money is paid into Court in lieu of bail, application must be made to take it out before issue joined. (*Hanwell* v. *Mure*, E. T. 1833, B. C., 2 D. P. C. 155; see also, ante, p. 412).

VI. OF STRIKING THE SUM PAID INTO COURT OUT OF THE DECLARATION.

HUBBARD *v.* WILKINSON, T. T. 1828. K. B. 8 *B. & C.* 496.

On a deposit in lieu of bail, under 7 & 8 Geo. 4, the defendant may apply that that sum be struck out of the declaration.

THE defendant having been arrested, paid into Court the sum indorsed on the writ, together with 20*l.* as a security for costs, pursuant to the stat. 7 & 8 Geo. 4, c. 7, s. 2.

The Court, on the application of the defendant, allowed the plaintiff to take out of Court a given portion of the sum paid into Court; and unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum.

VII. OF THE POWER OF THE COURT OVER THE SUM PAID IN.

SCHERWINSKI *v.* PERONNET, H. T. 1840. Ex. 8 *D. P. C.* 229; S. C. 6 *M. & W.* 90.

Under the 1 & 2 Vict. c. 110, the Court has the same power as under 43 Geo. 3 and 7 & 8 Geo. 4.

A DEFENDANT arrested on the 20th December deposited with the sheriff the sum indorsed on the capias, and 10*l.* for costs. On the 23rd December, he took out a summons to rescind the Judge's order, which was dismissed on the 7th January. On the 11th, defendant paid an additional 10*l.* into Court under the 7 & 8 Geo. 4, c. 71, s. 2; and on the 20th, the plaintiff obtained a rule nisi for the payment of the money out of Court to him, bail above not having been perfected in due time.

The Court held—1st, that, as the money was paid into Court before the rule was moved for, the plaintiff was not entitled to have it paid to him under the 43 Geo. 3, c. 46, s. 2; and 2ndly, that, under the 1 & 2 Vict. c. 110, the Court has the same power with respect to money deposited with the sheriff, or paid into Court in lieu of bail, as under the 43 Geo. 3, c. 46, s. 2, and 7 & 8 Geo. 4, c. 71, s. 2.

STULTZ *v.* HENEAGE, E. T. 1834. C. P. 2 *D. P. C.* 806; S. C. 10 *Bing.* 561; S. C. 4 *M. & Scott*, 472.

The Court has no power to direct money deposited to be transferred to a payment into Court on account of a plea of tender,

ON motion that money deposited in Court in lieu of bail might be treated as a payment into Court under a plea of tender—

The Court said, they had no authority under 7 & 8 Geo. 4, c. 71, to allow part of the sum deposited in lieu of bail to be transferred to a payment into Court on account of a plea of tender.

BALL *v.* STRAFFORD, M. T. 1835. C. P. 4 *D. P. C.* 327; S. C. 2 *Scott*, 426.

or payment of money into Court.

THE sum indorsed on the writ of capias had been deposited in lieu of bail. On motion for leave to plead a payment of money into Court, without paying in the money—

The Court, upon the authority of *Stultz* v. *Heneage*, ante, p. 414, where it was held, that money paid into Court in lieu of bail cannot be in part appropriated to the purposes of a plea of tender, refused the rule.

VIII. COSTS CONNECTED WITH*.

Deodand. See tit. *Coroner.*

Depositions. See tit. *Evidence.*

Descent†.

DOE *d.* BIRTWHISTLE *v.* VARDILL, E. T. 1826. K. B. 5 *B. & C.* 438. *Judgment affirmed*, 1 *Scott, N. S.* 828; S. C. 6 *Bing. N. S.* 385.

A child born in Scotland before marriage of parents domiciled there, and afterwards marrying, cannot inherit lands in England.

ON the question, whether a child who was born before the marriage of his parents can inherit real property in England, even though by the law of the country (Scotland) in which he was born, and in which his parents were married, he should be declared legitimate and capable then of inheriting.

Per Cur.—We are of opinion, that we should not be warranted in saying, that we can give effect to this legitimizing of the child by the subsequent marriage of the parent in Scotland. It by no means

* Before bail above are perfected, or until the time for excepting to them has passed, the defendant is entitled as a matter of right to pay in the debt, with a sum for costs, under the 7 & 8 Geo. 4, c. 71, s. 2; and therefore, though he does not pay in the money until after he has put in, though not justified, bail above, and the plaintiff has been put to expense by searching for them and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause. (*Stanforth* v. *M'Cann*, M. T. 1835, Ex., 4 D. P. C. 367; S. C. 2 C., M. & R. 632; Abr. ante, tit. *Costs.*

† By 3 & 4 Will. 4, c. 106, a variety of alterations and changes have been made in the law of descents. By sect. 1, it is enacted, "That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act, except where the nature of the provision of the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or Borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, pos-

follows, that, because we allow the validity of the marriage, that, therefore, we are to allow all the consequences of that validity. It

sibilities, rights, tithes, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words 'the purchaser' shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word 'descent' shall mean the title to inherit land by reason of consanguinity, as well as where the heir shall be an ancestor or collateral relative, as where he shall be a child or other issue; and the expression 'descendants' of any ancestor shall extend to all persons, who must trace their descent through such ancestor; and the expression 'the person last entitled to land,' shall extend to the last person who had a right thereto, whether he did or did not obtain the possession, or the receipt of the rents and profits thereof; and the word 'assurance' shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend to and be applied to a female as well as a male."

By s. 2, it is enacted, "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

By s. 3, it is enacted, "That when any land shall have been devised by any testator, who shall die after the 31st December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the said 31st December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

By s. 4, it is enacted, "That when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors contained in an assurance executed after the 31st of December, 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st December, 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

By s. 5, it is enacted, "That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent."

By sect. 6, it is enacted, "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue."

By s. 7, it is enacted, "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors shall have failed; and also that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

is not contrary to the law of England to say, that a marriage celebrated in any part of the world, according to the law of that particular place in which it is celebrated, is a good marriage in England. On the contrary, the law of England would be the law of all foreign countries, at least as to the manner and form of the celebration of the marriage; and allows every marriage to be a good marriage in England which is a good marriage by the law of the country in which it happened to be solemnized. It is part of the law of England to allow the validity of this marriage; but it by no means follows, that it is part of the law of England to allow the consequence which follows that marriage in this kingdom, and to allow the effect by which a child, born before the marriage of its parents, is considered to be born after their marriage. It appears to us by no means to follow, because you allow the validity of the marriage, you are to allow all the consequences which the law of the country in which the land is situated does not allow. On error, this judgment was affirmed.

By s. 8, it is enacted, "That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants."

By s. 9, it is enacted, "That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father, and their issue, and the brother of the half blood, on the part of the mother, shall inherit next after the mother."

By s. 10, it is enacted, "That where the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st of January, 1834."

By s. 11, it is enacted, "That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said 1st of January, 1834."

By s. 12, it is enacted, "That where any assurance executed before the said 1st of January, 1834, or the will of any person who shall die before the same 1st of January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st day of January, 1834."

Detainer*.

See also tit. *Prisoner*.

BARRATT *v.* PRICE, H. T. 1833. C. P. 1 *D. P. C.* 725; S. C. 9 *Bing.* 566; S. C. 2 *M. & Scott*, 634.

The Common Pleas decided there can be no detainer under another writ upon an illegal arrest.

ON motion to discharge the defendant from a detainer by the sheriffs of London on the ground that his arrest by them in a former action was illegal, and consequently that they could not justify a subsequent detainer. The facts were these:—The arrest in the former action had been made by one Richard Jackson, the son and assistant of William Jackson, one of the serjeants-at-mace to the sheriffs of London; and at the time of such arrest the warrant was not held by Richard Jackson, but by W. Jackson, to whom it was directed. After Richard Jackson had arrested the defendant without any warrant, he delivered him into the custody of a police officer under a false charge of felony; the father was then brought to the police station, and by handing the warrant over to Richard Jackson, his son, endeavoured by fraud to make the arrest appear to have been legal. On the ground of such fraud, on an application made to a Judge in the vacation, the defendant was ordered to be discharged from that arrest, but was then detained under a writ of ca. sa. issued by the plaintiffs.

Per Cur.—The question is, whether the same sheriffs can legally detain the defendant in custody under another writ, which they held against him at the time of such illegal arrest. And we are of opinion that they cannot; and the ground on which this opinion is formed is shortly this,—that the first arrest was illegal by the wrongful act of the sheriff himself.

ARUNDEL *v.* CHITTY, M. T. 1832. B. C. 1 *D. P. C.* 499.

In a prior case it was decided differently.

A WRIT of ca. sa., issued against the defendant at the suit of the plaintiff, was directed to the sheriff of Wiltshire. Afterwards a letter was written to the under-sheriff by the plaintiff, directing him not to execute the writ until further instructions should be received by him, but at the same time desiring him not to discharge the defendant out of custody, if he was in custody. Soon after this letter reached the hands of the under-sheriff the defendant was taken into custody in a cause of *Bastard* v. *Chitty*. This custody proved to be illegal.

Per Littledale, J.—Upon principle of law I think the defendant was in proper custody: he was in custody at the time the ca. sa. was in the sheriff's hands, and by operation of law the writ attached from that time though at the suit of another plaintiff.

* A writ of detainer directed "to the Marshal of our prison of the Marshalsea," instead of "to the Marshal of the Marshalsea of our Court before us:"—Held irregular. (*Storr* v. *Mount*, M. T., 1833, B. C., 2 D. P. C. 417).

The rule as to indorsement of the sum on the writ of detainer is compulsory, not directory, and the writ therefore set aside as irregular, with costs. (*Jones* v. *Price*, M. T. 1833, B. C., 2 D. P. C. 410).

WATSON *v.* CARROLL, H. T. 1839. Ex. 7 *D. P. C.* 217.—S. P. ROBINSON *v.* YEWENS, E. T. 1839. Ex. 7 *D. P. C.* 377; S. C. 5 *M. & W.* 149.

THE plaintiff was privileged from arrest redeundo from attendance in the Court of Chancery, and being arrested upon a writ of capias obtained a Judge's order for his discharge in that particular action only. The sheriff, having also writs of ca. sa. against him at the suit of other parties, detained him upon them.

And subsequently the Exchequer decided that a discharge upon an improper arrest in one action, did not apply to writs issued at the suit of other parties,

Per Cur.—It may perhaps be conceded, that, if with full knowledge of the plaintiff's privilege, the defendants had oppressively arrested him and maliciously detained him, an action would lie, yet this is a very different case. Here, when the plaintiff was returning to his chambers from attending the Court of Chancery he was arrested, upon which he obtained a Judge's order to discharge him in that particular action, and only in that one. Now no action would lie upon that Judge's order—that is out of the question. The whole effect of that order is, that in the opinion of the learned Judge the applicant was entitled to be discharged in that action, and it was notice to the sheriff of that upon which he was bound to act. But the sheriff has no notice as regards any other actions, and he detains him upon another writ which he has against him, and would have been liable if he had discharged him as to that. The plaintiff gave no notice as to the other actions and claimed no privilege as to them; he might for reasons of his own have wished to remain in custody as to them.

PEARSON *v.* YEWENS, E. T. 1839. C. P. 7 *D. P. C.* 451; S. C. 7 *Scott*, 435; S. C. 5 *Bing. N. S.* 489.—S. P. COLLINS *v.* YEWENS, T. T. 1839. Q. B. 10 *A. & E.* 570; S. C. 2 *P. & D.* 439; *Semble contra*, ROBINSON *v.* YEWENS, E. T. 1839. Ex. 7 *D. P. C.* 377; S. C. 5 *M. & W.* 149.

THE defendant was arrested by one S., who at the time had no warrant from the sheriff. In order to give a false colour of legality to the caption, S. procured one N., who had a warrant against the defendant at the suit of another plaintiff, to hand over that warrant to him, and the under-sheriff altered the warrant by substituting the name of S. for that of N., as the officer by whom it was to be executed.

unless the irregularity was the bailiff having no warrant.

The Court held, that the defendant was not in the lawful custody of S., and that the sheriff having by the alteration of the warrant become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs than those in the sheriff's hands.

GARCIA, *Ex parte*, M. T. 1836. C. P. 5 *D. P. C.* 352; S. C. 3 *Bing. N. S.* 299; S. C. 3 *Scott*, 662.

THE defendant, a bankrupt, was in custody of the warden for debt; the commissioners directed their warrant to the keeper of Newgate to detain the bankrupt in his custody until he should make satisfactory answers &c. Upon writ of habeas corpus directed to the warden commanding him to bring up the bankrupt, that he might be discharged from such warrant, it appearing from the return to the writ that the party was in the warden's custody upon

Where a defendant is in custody on several detainers, the Court will not inquire into the original committal.

five writs for debt, but that he was not in his custody under the warrant, which was in fact not in the warden's possession, but in that of the keeper of Newgate, to whom it was directed—

The Court refused to discharge the prisoner, and remanded him on the causes returned by the warden, without inquiring into the validity of the commitment.

EX PARTE COGG, H. T. 1838. C. P. 6 *D. P. C.* 461; S. C. 5 *Scott*, 715.

The fact of one Court discharging a party detained, is not a sufficient reason to induce another Court on the same ground.

MOTION for the discharge of the defendant out of custody as regarded a suit in this court. He had been arrested on a ca. sa. at the suit of a plaintiff in the Exchequer, but that writ had been set aside on the ground of irregularity. The defendant was now in custody on a detainer lodged against him in a suit in this Court.

Tindal, C. J.—The case of *Barratt* v. *Price*, (1 D. P. C. 725; ante, p. 418), is, I think, an answer to the action.

BODINGTON *v.* WOODLEY, M. T. 1838. Q. B. 1 *P. & D.* 159.

Since the 1 & 2 Vict. c. 110, a Judge cannot order a prisoner to be detained "until he has given bail or until further order."

A JUDGE at chambers, acting under the 1 & 2 Vict. c. 110, s. 7, made an order, that, it appearing to his satisfaction that there was probable cause for believing that the defendant was about to quit England, he should be detained in custody until he gave bail in the sum of 3000*l.*, or until further order.

Per Cur.—There is one ground in respect of which this order cannot be sustained, and that is, because it directs the imprisonment to continue until bail be given for a certain amount, or until further order. That is illegal in any view of the case. The Judge had no right to make his own or any other Judge's order the means of determining the imprisonment.

REG. GEN. T. T. 1833. K. B. 2 *N. & M.* 287; S. R. 5 *B. & Ad.* 467; S. R. Ex. 1 *C. & M.* 865.

Upon a detainer the plaintiff must declare before the end of the term next after.

A PARTY being rendered to prison under a capias or detainer under 2 Will. 4, c. 39, before declaration, plaintiff is to declare before the end of the term next after such arrest or render, or the defendant will be entitled to his discharge upon a common appearance, unless a Judge shall give further time to declare.

Detinue, Action of.

I. RELATIVE TO THE GENERAL NATURE OF, p. 421.

II. RELATIVE TO, WHEN MAINTAINABLE, p. 421.

III. RELATIVE TO, BY AND AGAINST WHOM MAINTAINABLE, p. 421.

IV. RELATIVE TO THE PLEADINGS.

(*a*) DECLARATION, p. 422.

(*b*) PLEAS, p. 423.

V. RELATIVE TO THE EVIDENCE, p. 424.

VI. RELATIVE TO STAYING PROCEEDINGS, p. 424.

VII. RELATIVE TO THE DAMAGES, p. 424.

VIII. RELATIVE TO THE VERDICT, JUDGMENT, AND COSTS, p. 425.

IX. RELATIVE TO THE EXECUTION, p. 425.

I. RELATIVE TO THE GENERAL NATURE OF *.

II. RELATIVE TO, WHEN MAINTAINABLE †.

III. RELATIVE TO, BY AND AGAINST WHOM MAINTAINABLE.

HARVEY *v.* ARCHBOLD, H. T. 1825. K. B. 3 *B. & C.* 626; S. C. 5 *D. & R.* 500; S. C. 1 *Ry. & M.* 184.

Assignees of a bankrupt cannot maintain detinue without a demand.

IN an action of detinue by the assignees of a bankrupt, it appeared, that, by the terms of dealing between the bankrupts and the defendants, merchants at Gibraltar, goods were consigned on commission, and advances made through the defendants' agents, by bills at ninety days, on two-thirds of the invoice prices, as soon as invoices and bills of lading were delivered, upon the usual rate of interest (6*l.* per cent.) and commission at Gibraltar. It appeared, however, that the agents, instead of accepting the defendants' bills, paid the amount, deducting 5*l.* per cent. discount; but the jury found that this was no part of the bargain, and the goods were in fact sold at G. at a considerable loss upon each assignment.

* An action of detinue is the proper form to be adopted for the recovery of a personal chattel, and at the same time damages accruing to the plaintiff from its detention, especially as this is the only remedy by suit where a chattel can be regained in specie, unless in those cases where the party can recover possession in replevin; and even in this form it is at the election of the defendant whether he will deliver the specific goods or pay the value as estimated by the jury. (See Bl. Com. 146; Wils. 120; Co. Litt. 296; Com. Dig. tit. *Detinue;* Petersd. Sup. to Blackstone, 133).

† This action is only sustainable for the recovery of a personal chattel, and not for real property; (see Cro. Jac. 39); therefore it lies not for a house; (see Cro. Jac. 39); and it is requisite that the thing detained should be capable of being specifically identified, or clearly distinguishable from the other property; hence it will not lie for money, unless in a box, (see Cro. Eliz. 457; 1 Inst. 286), nor corn out of a sack, because these things have no peculiar mark or quality whereby they may be ascertained or known from other things of the same kind, so as to re-deliver them to the plaintiff. (See Co. Lit. 286; Bac. Ab. *Detinue,* (B.); 2 Bulst. 308). But it lies for a horse or cow; (see F. N. B. 322); or for deeds or other writings, if the plaintiff can describe what they are, although the date be not mentioned. (See Bac. Ab. *Detinue,* (B.); Bull. N. P. 50).

The Court held, that there being no proof of any demand of the goods, or of any part then remaining in the defendants' hands, the plaintiffs, as assignees, could not support detinue.

IV. RELATIVE TO THE PLEADINGS.

(*a*) Declaration.

Gledstane *v.* Hewitt, T. T. 1835. Ex. 1 *C. & J.* 565; S. C. 1 *Tyrw.* 445.

The bailment is not a material allegation, the wrongful detainer being the gist of the action,

A. declared against B. in detinue as upon a general bailment, and B. pleaded, that the subject-matter was delivered, not upon a general bailment, but as a deposit for a loan of money still due; A. replied a tender, and B. demurred, alleging that the replication was a departure from the declaration.

Per Cur.—We are of opinion, that the detainer is the gist of the action, and the bailment only inducement. Though the bailment here be different from that which the declaration states, the plaintiff does not traverse that bailment, but replies a tender, and adheres to the main allegation of detainer. This cannot be a departure. In the case cited from Willes, (120), where a different bailment was stated in the plea from that declared upon, the merits of the case turned upon the nature of that bailment. That case is decisive of the principle, where the bailment pleaded is of a different kind from that alleged in the declaration, and its nature involves the real question of right to recover. In *Bateman* v. *Elman*, (Cro. Eliz. 866), it was determined, that the difference in the mode of bailment did not constitute a departure. We are, therefore, of opinion, that judgment should be for the plaintiff.

Walker *v.* Jones, E. T. 1834. Ex. 2 *C. & M.* 672; S. C. 4 *Tyrw.* 915.

and must be traversed.

In detinue, the defendant pleaded, that the plaintiff did not deliver the goods to the defendant:—Held bad on demurrer, the detainer, not the bailment, being the matter material to be traversed.

Kirkpatrick *v.* Bank of England, M. T. 1840. Ex. 8 *D. P. C.* 881.

In detinue for a note a count in debt may be added for the amount.

The first count of the declaration was in detinue for a bank-note; the second was in debt for the non-payment of the note. The particulars of demand annexed to the declaration claimed the amount of the note, or damages for the detention of it. On motion to strike out one count, it was opposed on the ground that it did not appear that the counts were for the same cause of action. The particulars shewed that the count in debt was for the recovery of the amount of the note dated twenty-three years before, whereas the first count was for damages for the detention in the then present year. The plea of the Statute of Limitations might, therefore, be supported as to one count, and fail as to the other.

Parke, B.—That is a sufficient reason for allowing both counts to stand.—Rule refused.

(*b*) PLEA.

BROADBENT *v.* LEDWARD, M. T. 1839. Q. B. 2 *P. & D.* 45; S. C. 11 *Ad. & E.* 209.

In detinue, the non joinder of a co-plaintiff must be pleaded in abatement*.

IN an action of detinue by one of several joint tenants—

The Court held, that the objection that the other tenants should have joined could be taken advantage of only by plea in abatement.

RICHARDSON *v.* FRANKUM, E. T. 1840. Ex. 8 *D. P. C.* 346; S. C. 6 *M. & W.* 420.

The right to detain cannot be shewn under non detinet.

DETINUE for a promissory note. Pleas—first, non detinet; secondly, that the plaintiff was not possessed of the note in question; thirdly, that before the commencement of the suit, the plaintiff, for a good and valuable consideration, assigned and delivered the said promissory note to one John Granger, to be by him held as and for his own note, and that John Granger, before the commencement of this suit, delivered the said note to the defendant, to be by him held for and on the behalf and for the use and benefit of the said John Granger; and that the defendant, as the servant and by the command of the said John Granger, detained and detains the said promissory note, as he lawfully might, &c. The replication denied the assignment and delivery of the note by the plaintiff to John Granger, and the delivery by him to the defendant. The jury found a verdict for the defendant on the second and third issues; and *Gurney*, B., reserved leave to the defendant to move to enter a verdict for him on the issue of non detinet also, if the Court should be of opinion that the matters of defence so found in his favour could be given in evidence under that issue.

Per Cur.—There is no ground for this application, either at common law or under the new rules. At common law, under the issue of non detinet, a defendant might prove that the goods were not the property of the plaintiff; but if he had a lawful excuse for the detention he was bound to plead it. Co. Litt. 283.—By the new rules, he cannot give in evidence under non detinet that the goods were not the plaintiff's property; so that, in either view of the case, the matters proved under the second and third issues are not evidence under the first. Under the issue of non detinet, the principle of detention is alone in dispute. We are surprised that this motion should have been made.

PHILLIPS *v.* ROBINSON, M. T. 1826. C. P. 4 *Bing.* 106; S. C. 12 *Moore*, 308.

But the defendant may

THIS was an action of detinue, to recover certain deeds in the possession of the defendant, and which were enumerated particu-

* In detinue for papers against an attorney after his bill paid in full, plea, non detinet:—Held, that the plaintiff must prove the defendant's possession; but shewing that they were produced by his agent before the Master, on taxing the bill, held sufficient, and that it was no defence that the agent detained the papers on the ground of lien against his client. The defendant having set up as a defence the delivery of the papers to one K., according to a notice from the plaintiff's attorney:—Held, that K. might be called to shew the delivery in another right, and that he had a lien thereon, as against the defendant. (*Anderson* v. *Passman*, 1835, N. P., 7 C. & P. 193).

shew that the property had passed from the plaintiff.

larly, and described in the declaration, and which the plaintiff averred were to be re-delivered to him by the defendant. Pleas—first, non detinet; secondly, that the plaintiff did not deliver the deeds and writings to the defendant; thirdly, that the plaintiff was not lawfully possessed of them; fourthly, that the deeds were not the property of the plaintiff; fifthly, that plaintiff caused the deeds to be delivered to the defendant to be examined and perused by him in his profession as a conveyancer; and lastly, that the deeds were delivered to him, and that he detained them until he was paid his charges for drawing, &c. &c. On these pleas issue was joined. It appeared that an estate having been devised to the plaintiff's wife after marriage, he delivered the title-deeds to a certificated conveyancer, and instructed him to prepare a conveyance and levy a fine, to which the plaintiff and his wife were parties, declaring the uses to their second son.

The Court held, that the plaintiff could not maintain detinue for the deeds, as the property in the lands to which they related was, by the operation of the fine, conveyed to his second son.

V. RELATIVE TO THE EVIDENCE*.

VI. RELATIVE TO STAYING PROCEEDINGS.

PHILLIPS *v.* HAYWARD, H. T. 1835. B. C. 3 *D. P. C.* 362.

Proceedings will be stayed on terms.

IN detinue for deeds—

The Court granted a rule to stay proceedings on delivery of part of the deeds claimed, and payment of costs, if the plaintiff would accept them in discharge of the action, otherwise such deeds to be struck out of the declaration, the defendant undertaking, upon a claim of lien as to others, to plead such lien, and not non detinet.

VII. RELATIVE TO THE DAMAGES†.

* On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum:—"This draft was signed in my presence, on the date within named, (Signed) N. D.:"—Held, that the plaintiff must call N. D. to prove the making of the note; held also, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an indorsement on the note as well as what was written on the face of it. (*Richards* v. *Frankum*, 1840, N. P., 9 C. & P. 221).

† The value of each article must be separately found by the jury, however small or trivial the amounts may be. (*Anderson* v. *Passman*, 1835, N. P., 7 C. & P. 193).

VIII. RELATIVE TO THE VERDICT, JUDGMENT, AND COSTS *.

XI. RELATIVE TO THE EXECUTION †.

Debastabit. See tit. *Executor and Administrator.*

Debiation. See tit. *Insurance.*

Debise ‡.

Dilapidations.

(See also tit. *Landlord and Tenant*).

WISE *v.* METCALFE, M. T. 1829. K. B. 10 *B. & C.* 299.

The incumbent is bound to keep the parsonage-house in good and substantial repair, but he is not bound to ornament.

IN an action on the case, in which the plaintiff, as rector of the parish church of Bailey, in the county of Hertford, claimed damages against the defendant as executor of William Metcalfe, the late rector, for dilapidations in respect of the rectory-house, barns, stables, and out-buildings belonging to the rectory, and also in respect of the chancel of the church; and which dilapidations, it was alleged, had arisen between the time of Mr. Metcalfe's becoming rector and his death.

The Court held—first, the liability of an incumbent to repair the parsonage-house and the chancel is a liability at common law, and has not been enlarged by any statute; secondly, the principle upon which that liability is to be ascertained in amount is, that the premises are to be put into such a state of repair as an out-going lay-tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair; thirdly, but he is not

* Where the action is brought for several distinct chattels, the jury ought to find the value of each particular thing; (see 10 Co. 119; 2 Black. 854); but a flock of sheep is entire; (see 10 Co. 119); and if the jury neglect to ascertain the value, the omission cannot be supplied by writ of inquiry. (See Salk. 206). The form of the judgment is in the alternative, that the plaintiff shall either recover the thing in question, or, if he cannot have it in specie, the value thereof, and his damages for the unjust detainer, with full costs. (See Cro. Eliz. 116; Tidd's Forms, 302).

† Upon a judgment in detinue, the execution is for the goods, or their value, with damages and costs. (See Tidd, 1008, 7th ed.).

‡ As the stat. 1 Vict. c. 26 is as applicable to wills as devises, it has been considered preferable to place the cases connected with devises under tit. *Will*, post.

bound to supply or maintain any thing in the nature of ornament. Painting, whitewashing, and papering are for this purpose considered as ornament, except where the painting be necessary to preserve exposed timber from decay.

BIRD *v.* RELPH, E. T. 1835. K. B. 2 *Ad. & E.* 773; S. C. 4 *N. & M.* 878.

So, allotments made to an incumbent follow the same rule as to repairs as the ancient glebe land, and his executors are liable for dilapidations.

THIS was an action on the case by the plaintiff as vicar against the defendant, and his wife, as executrix of the last vicar, William Smith, for dilapidations of the vicarage-house, and of the fences of the gardens and ancient glebe lands, and of certain lands of which Smith was seised, jure vicariæ. The defendants suffered judgment by default as to the dilapidations of the vicarage-house and outhouses, and of the fences of the gardens and ancient glebe lands, and pleaded the general issue as to the residue.

Per Cur.—As to the liability in respect of the dilapidations of the fences of the ancient glebe land, no question arises, the defendants having let judgment go by default as to them; but the question here is, whether the executors are liable in respect of the lands allotted to the testator as vicar under the Inclosure Act. This action is not brought upon that act, but upon the common law and custom of England; and, therefore, the question to be considered is, whether an allotment made to the late vicar in lieu of tithes can be subject to the common law and custom of England. We are of opinion, that this allotment follows the same rule as the ancient glebe land, &c., the more especially as it was given to the vicar in lieu of the tithes previously annexed to the vicarage. It does not follow, that the vicar would have been bound to put up fences, or to keep them in repair afterwards, if new land had been given to the vicarage, or an allotment made, as in this case, and such land had originally come to him uninclosed.

BIRD *v.* RELFE, E. T. 1833. K. B. 1 *N. & M.* 415; S. C. 4 *B. & Ad.* 826.

But an incumbent cannot maintain an action for dilapidations against an executor in respect of improper cultivation and management of glebe.

THIS was an action by the present incumbent of a living against the executrix of a deceased incumbent for dilapidations. The first count was for non-repair of the vicarage-house, &c., and the fences of the garden and glebe lands, as to which there was judgment by default. The second count applied to the non-repair of the vicarage-house, and certain lands lying and being in the county of Cumberland. The third count, after alleging that, by the law and custom of England, hitherto used and approved of, all and singular the vicars for the time being ought not to manage, use, or cultivate the lands of and belonging to their respective vicarages otherwise than in a good and husbandlike manner, and according to the custom of the county, alleged that the deceased cultivated the lands belonging to the vicarage in an unhusbandlike manner, and contrary to the custom of the county, by over-cropping. The fourth count was for not cultivating certain lands within the county belonging to the vicarage in a husbandlike manner. A verdict was found for the plaintiff, and the jury assessed the damages to the buildings at 78*l.* 4*s.*, and for the damages to the glebe, &c., and the fences, 100*l.*,

with leave for the plaintiff to move to increase the damages to such amount as should be found by an arbitrator in case the Court should be of opinion that the plaintiff was entitled to recover for the over-cropping.

Denman, C. J.—It appears to me, that this is a new species of action, to attempt to charge the executor of a deceased incumbent for dilapidations by reason of the lands having been over-cropped. We think the action cannot be maintained.

Diploma.

See also tits. *Game—Physician.*

COLLINS *v.* CARNEGIE, T. T. 1834. K. B. 3 *N. & M.* 703; S. C. 1 *Ad. & E.* 695.

A diploma is proved by identifying its seal.

THE witness going to a town, the seat of a university, and being told that a certain building is the college, and a person pointed out there as the librarian, who, on application, produces a seal, which he states to be the seal of the university, and a book, the book of the acts, or statute-book of the university; that he compared such seal with that on a diploma, and made a duly examined copy from the entry in the book of an act conferring a degree of M. D.—

The Court held, that such diploma was duly authenticated, and the act conferring the degree properly proved.

Disclaimer.

See tit. *Landlord and Tenant.*

DOE *d.* LEWIS *v.* LORD CAWDOR, T. T. 1834. Ex. 1 *C., M. & R.* 398; S. C. 4 *Tyrw.* 852.

A disclaimer must be express, it cannot be presumed.

BUILDINGS had been erected on waste, as supposed, by permission of the deceased father of the lessor of plaintiff, given to the deceased father of the defendant. After their respective deaths, a correspondence took place, dated after the day of the demise, between the lessor of plaintiff and defendant's agent, in which the latter requested to be informed of the proofs of the supposed right, alleging a total ignorance of the supposed claim.

The Court held, this did not amount to a disclaimer, and even if so, would be insufficient as a disclaimer; it ought to have amounted to a recognition of a disclaimer antecedent to the day of the demise, and the agent shewn to have authority to bind by a disclaimer on his part.

DOE *v.* COOPER, E. T. 1839. C. P. 1 *M. & G.* 135; S. C. 1 *Scott, N. S.* 36.

What amounts to a disclaimer is a question for the jury.

H., HOLDING for the life of K., let the premises to the defendant year by year, with an agreement for a lease for seven years, or for his own lease; and on the expiration of the seven years, having sold his

interest to the plaintiff, the latter demanded first the possession, to which the defendant replied that he held on lives, and should hold as long as they lived; a quarter's rent was then demanded, to which the defendant answered, that he held of H., who had directed him to pay K., and that he should do so.

The Court held, that it was properly left to the jury, and that they were justified in finding that there was no disclaimer, the defendant asserting no title in himself, but merely that he insisted on standing by the agreement; and in the absence of any notice to quit, the plaintiff was not entitled to recover the premises.

DOE *d.* MEE *v.* LITHERLAND, E. T. 1836. K. B. 6 *N. & M.* 313; S. C. 4 *Ad. & E.* 784.

A tenant attorning to a different lessor is a disclaimer.

IN ejectment, it appeared that the defendant, having paid rent to the lessors of the plaintiff (as executors of the original former landlord), before the day laid in the demise attorned to another.

The Court held this a sufficient disclaimer, and that an admission of such attornment, made after the action brought, was sufficient evidence of disclaimer, as against them.

DOE *v.* PITTMAN, M. T. 1833. K. B. 2 *N. & M.* 673.

So, if A. let B. into possession; on a demand of rent by A., B. says, "I have no rent for you, because C. ordered me to pay none," this is evidence of a disclaimer.

IN ejectment, a question arose, whether Mary Whittle, who had paid rent to the lessor of the plaintiff, and by whom the defendant was let into possession, had disclaimed the tenancy. The evidence of the disclaimer was as follows:—Mary Whittle, upon being applied to for her rent, said to the person by whom the application was made, "I have no rent for you;" and referred him to her daughter, who was in the town, for the reason. The daughter said, "The Pittmans have ordered us to pay none."

Denman, C. J.—We think it was clearly evidence of a disclaimer. The daughter must be considered as the index of the mother's mind.

DOE *d.* CALVERT *v.* FROWD, T. T. 1827. C. P. 4 *Bing.* 557; S. C. 1 *M. & P.* 480.

And declining to pay the landlord rent without satisfactory proof of his title is such a disclaimer as to render no notice necessary.

IN ejectment, it appeared that the defendant held, under one M. H., certain premises which had been devised to the latter for life. On the death of M. H., the tenant for life, possession was claimed, and rent demanded, by the heir-at-law of the devisor. The defendant, for answer, alleged, that he held as tenant to S. (the husband of M. H.); that he had never considered the plaintiff as his landlord; that he would be at all times ready to pay the arrears to any person who should be proved to be heir-at-law, or otherwise entitled to receive them; but that he must decline taking upon himself to decide upon the plaintiff's claim, without more satisfactory proof in a legal manner.

The Court held, that this was such a disclaimer of the title of the plaintiff as to dispense with the necessity of a notice to quit.

DOE *d.* GRAVES *v.* WELLS, T. T. 1839. Q. B. 10 *A. & E.* 427; S. C. 2 *P. & D.* 396.

But a mere assertion of title

IN ejectment, it was proved on the part of the plaintiff, that A. B., the lessor of the plaintiff, was entitled to the reversion upon a lease

under which C. D. held, which lease was for 99 years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved, that on the 17th October, 1836, A. B.'s agent, in a conversation with C. D., who was then in possession, demanded the rent of him, but C. D. then refused to pay it, and asserted the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer involving a forfeiture of C. D.'s lease. The defendant's counsel disputed this, and argued further, that, even supposing this to be a forfeiture, the demise was laid too early, being on the day of the supposed forfeiture.

will not do, if there be no act nor matter of record amounting to a disclaimer.

Patteson, J., directed the jury to find for the plaintiff if they were of opinion that the words used by C. D. were not idle language, but a serious claim of the fee. The jury found for the plaintiff. On motion to enter a verdict for the defendant—

The Court held, that where there was no act nor matter of record amounting to a disclaimer, a lease for a definite term could not be forfeited by mere words of assertion of the tenant of his title to the fee.

DOE *d.* GRAY *v.* STANION, T. T. 1836. Ex. 1 *M. & W.* 695; S. C. 1 *T. & G.* 1065.

A TENANT from year to year, by memorandum, agreed to become the purchaser, and the landlord to let the price lie by paying 4 per cent., and a deposit was paid; but neither rent nor interest being paid the landlord demanded the possession, when the tenant said he had bought the property and would keep it.

So, an avowal by a tenant that he shall insist on the contract of purchase, and that he was ready to perform it, is not a disclaimer.

The Court held, 1st, that in the absence of any conveyance, and it being uncertain whether the estate would ever be transferred, the subsequent holding was not to be deemed a surrender of the interest as yearly tenant and the holding as merely at will, and a notice to quit therefore necessary; and 2nd, that the declaration of the tenant being no more than an avowal that he should insist on the contract of purchase, and that he was ready to perform it, and not being inconsistent with the continuance of the yearly tenancy, did not amount to a disclaimer so as to supersede the necessity of such notice.

BEGBIE *v.* CROOK, T. T. 1835. C. P. 2 *Bing. N. S.* 70.

IN replevin, it appeared that the testator, seised in fee, devised to three trustees for certain trusts, and one disclaimed by deed.

Under a devise to trustees one trustee may disclaim the estate by deed.

The Court held, that such disclaimer was, without matter of record, sufficient to vest a complete title in the two others, and enable them to support a distress for rent upon the premises devised; observing, that in *Nicholson* v. *Wordsworth*, (2 Swanst. 365), Lord *Eldon* said, "If, therefore, the party executes a simple instrument, and under his hand and seal declares that he disclaims, that is, dissents from being a trustee, the fact must be taken to be that he is no trustee. If the essence of the act is disclaimer, and if the point were res integra, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties and vest the estate in the other trustees, a party who releases and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee.

See 3 *B. & Ald.* 31; 2 *Swanst.* 365.

Discontinuance.

ELWORTHY *v.* BIRD, T. T. 1824. C. P. 2 *Bing.* 258.

The term discontinuance means "putting an end to the suit in a legal way."

IN a declaration upon an agreement, made pending a judgment on an indictment whereon the defendant had been found guilty, that all other indictments "should be discontinued," it was averred that all such indictments had been wholly discontinued and not further proceeded with; and it appeared that the plaintiff had taken no steps by nolle pros. or otherwise towards putting an end to such indictments.

The Court held, that the term discontinuance meant "putting an end to the suit in a legal way," and this not having been shewn the plaintiff was properly nonsuited.

GOODENOUGH *v.* BUTLER, E. T. 1835. Ex. 3 *D. P. C.* 751.

It is too late to discontinue after verdict for the defendant, with leave for the plaintiff to move to enter a verdict for himself.

THE defendant having obtained a verdict in this case, the plaintiff took out a side bar rule to discontinue. On the authority of *Sweeting* v. *Halse*, (4 M. & Ry. 544; S. C. 9 B. & C. 369), it was contended that there was no reason why the plaintiff should not be allowed to discontinue this action. The defendant will not be prejudiced, for he will get his costs. It is laid down in 2 Arch. Pr., p. 898, that the Court may probably grant a rule to discontinue, even after a special verdict.

Per Cur.—There must have been a consent in that case; at all events this objection was not made. All the applications which are made for leave to enter a nonsuit would have been unnecessary, if the plaintiff could discontinue by a side bar rule.

POENSGEN *v.* CHANTER, E. T. 1838. C. P. 6 *Scott*, 300.

On a discontinuance the costs are discretionary, depending upon circumstances.

ON a rule calling upon the defendant to shew cause why the plaintiff should not discontinue without payment of costs. It appeared that the plaintiff Poensgen, and his partner, who resided principally at Aix-la-Chapelle, entered into a written contract with the defendant Chanter, for the purchase of a locomotive engine, to be fitted up with one of Chanter & Co.'s patent copper fire-boxes, and the sum of 950*l.* was paid by the plaintiffs. The contract, however, not having been fulfilled by the defendant, Poensgen, who was in London, gave his solicitor instructions to recover the money. The latter having found that the defendant described himself as "John Chanter & Co.," and that he signed the agreement as John Chanter, for self & Co., made inquiries as to the persons constituting the firm; and the result of his inquiries upon the subject, coupled with the fact of a printed report of a testimonial purporting to have been signed by divers persons at Liverpool and elsewhere, in which it was stated, that a certain smoke-consuming furnace, understood and believed to be the patent fire-box in question, was patented by the defendant Chanter, and J. Gray, of the Liverpool and Manchester Railroad, engineer, which report was left at the attorney's chambers by Chanter, induced him, (the attorney), to believe that Gray was the partner who was referred to, and who came

under the description of Co. In consequence of this impression the affidavit of debt was made against Chanter and Gray, and a capias, founded upon such affidavit, was left for execution with the sheriffs of London. It was afterwards, however, communicated by the defendant's attorney to the opposite attorney, that Gray, although a partner with Chanter in other transactions, was not connected with him in this, and that he alone constituted the firm of J. Chanter & Co. An application was then made to the defendant's attorney to strike the name of Gray out of the affidavit of debt and the capias, and continue proceedings against Chanter alone; which being refused, the rule as above stated was obtained. No arrest was actually made, and the defendant Chanter alone put in bail.

Per Cur.—When the plaintiff discontinues, the defendant has a right to his costs, under the stat. 8 Eliz. c. 2. Undoubtedly, cases have occurred in which these costs have been remitted, according to the discretion of the Courts; when, for example, it appeared that any thing had been done by the defendant which had the effect of misleading the plaintiff; and the question is, whether any thing which has been done by the defendant here can be said to have the effect of so misleading his opponent. The suing out of the writ against two individuals, was, it is said, such an act as it should be reasonably concluded could only arise from the conduct of the defendant Chanter; but to this proposition we do not assent. If, indeed, an application had been made to Chanter, or to his attorney, for information, and any deception had been practised, such incident would, perhaps, be decisive of the case. The only question, however, is, whether the paper signed by Chanter for self & Co., coupled with the fact of the printed report of the smoke-consuming furnace, patented by the defendant and Gray, and this given by Chanter to the plaintiff's attorney, were sufficient to induce the plaintiff to suppose that they were the only partners. Such incident would, no doubt, go far in favour of the plaintiff in an action for a malicious arrest, if it could be supposed discreet in such a state of things to bring one; but, as far as we can understand the circumstances of the case, the intention was not to mislead the plaintiff. He should have asked, if Gray was a partner; this he did not do; but he went on in the exercise of his discretion. The rule should, we think, be discharged. The plaintiff should be allowed to discontinue, but on the usual terms of paying costs.

EDGINTON *v.* PROUDMAN, H. T. 1832. B. C. 1 *D. P. C.* 152.

To constitute a discontinuance, the costs must be paid—taxation alone is not sufficient.

THE plaintiff had, on the 3rd of December, served a rule to discontinue on payment of costs. An appointment to tax was made, and the costs taxed. The costs were not paid, and the plaintiff proceeded with the action. At the trial, the counsel attended, and protested against the cause being tried. The Judge who tried the cause overruled the objection, and a verdict was obtained by the plaintiff.

Parke, J., (after consulting with the Master).—The taxation of costs, without payment of them, is not a discontinuance. The words of the rule are, "upon payment of costs." The condition of the continuance is, therefore, not fulfilled without payment, and, consequently, no discontinuance has taken place.

WOLLEN *v.* SMITH, H. T. 1839. K. B. 1 *P. & D.* 374.

After plea of bankruptcy, plaintiff is entitled to discontinue without payment of costs.

THE defendant was arrested on the 12th of November, 1836, and the plaintiff declared in February, 1837, in which month the defendant pleaded. On the 18th of March, the defendant obtained his certificate, a fiat in bankruptcy having issued against him in the previous July. The defendant pleaded his certificate puis darrein continuance, and ruled the plaintiff to reply. The plaintiff took out a summons before *Littledale*, J., for leave to discontinue, without costs. His Lordship referred the parties to the Court.

Per Cur.—Where a defendant pleads a plea puis darrein continuance, he cannot compel the plaintiff to proceed with his suit; but the latter is at liberty to discontinue without costs. There is no distinction in regard to the plea of bankruptcy and certificate, the 6 Geo. 4, c. 16, s. 59, not preventing the plaintiff from discontinuing without costs, where the defendant pleads *puis darrein continuance*.

DOE *d.* POSTLEWHAITE *v.* NEALE, M. T. 1836. Ex. 2 *M. & W.* 732.

On a discontinuance before notice of trial, the defendant is not entitled to the costs of the drafts of briefs.

ON the question as to costs on a discontinuance—

The Court held, that where a plaintiff discontinues, not having given notice of trial, the defendant is not, under any circumstances, entitled to the costs of the drafts, or copies of the briefs.

FANSHAWE *v.* HEARD, E. T. 1827. C. P. 1 *M. & P.* 191; S. C. 3 *C. & P.* 190.

The discontinuance of an action can only be proved by the rule to discontinue.

AN action having been brought by the plaintiff against the defendant, it was agreed between them, that the plaintiff should discontinue, and that the defendant should pay him the legal costs incurred as between party and party. The costs were afterwards taxed, and an action brought to recover the amount; and, in his declaration, the plaintiff averred, that he had discontinued, but he had not obtained a rule to discontinue.

Per Cur.—The plaintiff clearly had no right to commence this action until the former one had been regularly discontinued, and that could only be done by a rule for that purpose. As the case now stands, the action is only suspended, and may be yet revived. It has been held, at Nisi Prius, that even the production of a rule to discontinue was not evidence of a discontinuance, but that it was incumbent on the plaintiff to shew that it was entered on the roll.

POWER *v.* BUTCHER, M. T. 1829. K. B. 10 *B. & C.* 329.

A plea, alleging a discontinuance of a former action, and acceptance of money in discharge, is not proved by merely shewing the payment of the costs.

IN an action against several, the defendants pleaded a former action brought by the plaintiffs for the same cause against one of the defendants, and that he paid a small sum into Court, upon which the plaintiffs taxed their costs up to that time, and afterwards discontinued the action, and the defendant received his taxed costs—

The Court held, that the issue in the second action, that the plaintiff accepted the said sum and taxed costs in full satisfaction, was not proved by the fact of the plaintiff having received the costs only; and that the defendant, by accepting of the taxed costs, had assented to the discontinuance of the action.

Disfranchisement. See tit. *Corporation.*

Disorderly House. See tits. *Bawdy House—Board and Lodging—Use and Occupation.*

Dissolution. See tits. *Corporation—Partners.*

Distress.

I. DAMAGE FEASANT, p. 435.

II. FOR DOUBLE RENT AND VALUE, p. 436.

III. FOR FINES, p. 437.

IV. FOR PENALTIES TO BE RECOVERED BEFORE JUSTICES, p. 437.

V. FOR PORT DUES, p. 437.

VI. FOR RATES, p. 437.

VII. FOR RENT.

(*a*) WITH REFERENCE TO THE SEVERAL KINDS OF RENTS, p. 437.

(*b*) WITH REFERENCE TO THE PERSONS WHO MAY DISTRAIN.

1. *In general,* p. 439.
2. *Assignees,* p. 443.
3. *Executors,* 443.
4. *Joint Tenants and Tenants in Common,* 444.
5. *Receiver,* 444.
6. *Liability of Party authorizing the Distress,* p. 445.

(*c*) WITH REFERENCE TO THE PERSONS WHOSE GOODS MAY BE DISTRAINED, p. 445.

(*d*) WITH REFERENCE TO THE THINGS WHICH MAY BE DISTRAINED, p. 446.

(*e*) WITH REFERENCE TO THINGS IN THE POSSESSION OF THIRD PERSONS, p. 446. See also tits.

Innkeepers, *Stablekeepers,*
Principal and Agent, *Wharfingers.*

VII. FOR RENT—(*continued*).

(*f*) With reference to things in the custody of the law, p. 448.

(*g*) With reference to the place in which a distress may be made, p. 448.

(*h*) With reference to the period limited for making a distress, p. 448.

(*i*) With reference to the mode of conducting a distress.

1. *What amounts to a Distress,* p. 449.
2. *Of the demand of, and tender of the Rent,* p. 451.
3. *By whom,* p. 451.
4. *At what Time to be made,* p. 452.
5. *Of breaking open Doors, &c.,* p. 452.
6. *Of the Inventory,* p. 453.
7. *Of the Notice,* p. 453.
8. *Of the Appraisement,* p. 453.
9. *Of the Sale,* p. 454.
10. *Of the Surplus,* p. 454.
11. *Of the Charges to be paid to the Distrainer,* p. 454.

(*j*) With reference to, when the goods are already in execution, p. 455.

(*k*) With reference to making several distresses for the same rent, p. 455.

(*l*) With reference to making a joint distress for several rents, p. 455.

(*m*) With reference to a fraudulent removal, p. 456.

VIII. EXCESSIVE, p. 458.

IX. OF THE EFFECT OF, p. 459.

X. OF THE WAIVER OF, p. 459.

XI. OF A RE-TAKING, p. 459.

XII. WHERE NO SUFFICIENT DISTRESS, p. 460.

XIII. OF THE REPLEVY, p. 460.

XIV. OF AGREEMENTS TO WITHDRAW, p. 461.

XV. ACTIONS CONNECTED WITH.

(*a*) When maintainable, and form of, p. 461.
(*b*) By whom maintainable, p. 462.
(*c*) Of the declaration, p. 462.
(*d*) Of the pleas, p. 463.
(*e*) Of the replication and new assignment, p. 465.
(*f*) Of the evidence, p. 465.
(*g*) Of the witnesses, p. 466.
(*h*) Of the damages, p. 467.
(*i*) Of the costs, p. 467.

I. DAMAGE FEASANT*.

Wilder *v.* Speer, T. T. 1838. Q. B. 3 *N. & P.* 536.

Distrainers of cattle damage feasant are bound to provide a proper pound.

In trespass, the plaintiff alleged that the defendant impounded his cattle in a pound, which was then too small, and was then wet, muddy, and dirty; and the defendant pleaded, that the pound was not too small, and was not wet, muddy, and dirty; and issue was joined.

The Court held—first, that the question at the trial was not as to the pound, but as to its state and condition at the time of the impounding; and secondly, that a party who distrains cattle, and impounds them, is bound to see that the pound is in a fit state to receive the cattle distrained at the time of such impounding.

Brown *v.* Powell, E. T. 1827. C. P. 4 *Bing.* 230; S. C. 12 *Moore*, 454.

On a distress damage feasant, a tender to the agent of the distrainer is sufficient; but

In replevin, it appeared that sheep distrained damage feasant were put into an out-house, the wife of the party distraining saying that they were going to be sent to a public pound. The owner tendered amends to the wife, who had acted for her husband on similar occasions before.

* Beasts, not in use, may be distrained damage feasant; (see T. R. 138); but the distress must be confined to the very thing which is committing the injury. (See Willes, 638). And things can be considered as damage feasant only on private soil; so, that corn pitched in a market, or hides brought there for sale, cannot be distrained as damage feasant in a public market where persons have a right to bring their goods for sale. (See Cro. Eliz. 75; Willes, 623). But where any thing is placed improperly on another's soil, it is not necessary that it should actually do an injury to the soil or its produce; if it incumbers, it will suffice. (See T. Jones, 193; Brad. Dist. 204). A mare was distrained damage feasant by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. and B. joined in selling the mare for the keep:—Held, in an action of trover by the owner of the mare against A. and B., that if they bonâ fide and honestly intended to sell the mare under the provisions of the stat. 5 & 6 Will. 4, c. 59, s. 4, (the Cruelty to Animals Act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the Judge would not nonsuit, but left it to the jury to say, whether the defendants meant bonâ fide to act upon the provisions of tha statute, and if they did the defendants were entitled to their verdict. (*Mason* v *Newland*, M. T. 1840, N. P., 9 C. & P. 575).

it is too late after they are impounded.

Per Cur.—Two objections have been urged in this case. The one, that the tender was not made to a person duly authorized to receive it; and the other, that it was not made until after the sheep had been impounded. As to the first point, the evidence furnishes an answer to it; for it was proved at the trial, that the wife had acted on similar occasions before for her husband, and she was the only person to be seen on this occasion. As to whether or not the sheep could be considered as legally impounded at the time of the tender it is not necessary to decide, but it would seem that they were not; for, if such an impounding were to be so taken, a distress might be impounded in the place where seized, and thus the owner would be deprived of an opportunity of tendering amends. In *Pilkington's case*, (5 Rep. 76 a), the whole Court resolved that a tender, after the cattle were in the custody *of the law*, was too late.

KNOWLES *v.* BLAKE, E. T. 1829. C. P. 5 *Bing.* 499; S. C. 3 *M. & P.* 214.

If cattle be distrained damage feasant, and escape into the defendant's grounds again, and the plaintiff delivers them up, it is not a rescue.

IN case, it appeared that the plaintiff having taken the defendant's cattle damage feasant, and suffered them to escape, and to remain in the defendant's own field, whilst he went to the defendant to demand satisfaction for the damage done—

Per Cur.—Lord Coke, 161 a., says, "A rescous in law is, where a man hath taken a distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law." But here the horses were allowed to remain on defendant's land for half an hour. That was clearly an abandonment of the right of freshly following, and consequently of the distress. Lord Coke again says, "If the cattle, of themselves, after the view, go out of the fee, then cannot the lord distrain them." In *Vasper* v. *Eddows*, (Holt, 257), Chief Justice Holt says, "If a distress for damage feasant dies in pound, or escapes, the party shall not distrain de novo; but if it were for rent, in either case he may distrain de novo." If the cattle are allowed to escape, the case is stronger than that mentioned by Lord Chief Justice Holt.

WILLIAMS *v.* PRICE, T. T. 1832. K. B. 1 *B. & Ad.* 695.

And if put into a proper pound, but escape without any default of the distrainer, he may still maintain trespass.

To an action of trespass, the defendant, under 21 Jac. 1, c. 16, s. 5, pleaded, that the trespass was involuntary, and that, before action, he tendered a certain sum (naming it), being sufficient amends.

The Court held, that the plaintiff ought to have replied, either that that sum was not tendered, or that it was not sufficient amends. He cannot reply generally, that the defendant did not tender sufficient amends; and that when cattle are distrained damage feasant, are impounded, and escape from the pound, without the fault of the distrainer, his remedy by action for the trespass remains.

II. FOR DOUBLE RENT AND VALUE. See tit. *Double Rent and Value.*

III. FOR FINES*.

IV. FOR PENALTIES TO BE RECOVERED BEFORE JUSTICES. See tit. *Justice of the Peace.*

V. FOR PORT-DUES. See tit. *Port-Dues.*

VI. FOR RATES. See tits. *Churches and Chapels—Highway—Poor Rates.*

PLAXTON *v.* DARE, M. T. 1829. K. B. 10 *B. & C.* 17.

On a distress for rates, if a question of boundary arises, evidence of reputation is sufficient.

IN trespass for levying a distress for rates claimed to be due on lands in the parish of A., the question was, whether they were situate in that or the adjoining parish B.

Ancient leases granted by the plaintiff's ancestor, in which the land was described as being in the parish of B., were offered in evidence, and *Gaselee*, J., received them. The plaintiff had a verdict. On motion for a new trial—

The Court held, that, it being a question of boundary in which reputation was admissible, leases granted by the deceased ancestors of the plaintiff's landlord, describing the land to be situate in B., were properly received in evidence.

VII. FOR RENT.

(*a*) WITH REFERENCE TO THE SEVERAL KINDS OF RENT†.

SHORT *v.* HUBBARD, M. T. 1824. C. P. 2 *Bing.* 349; S. C. 9 *Moore*, 667.

A rent-charge is within the 11 Geo. 2, c. 19, as to a distress.

THIS was an action brought by the plaintiff, as assignee of the sheriff of the county of Lincoln, against the defendant on a replevin bond. The declaration stated, that the plaintiff distrained the goods of Hubbard for money due to him as surviving trustee under

* A fine which is not reasonable and moderate is illegal, and not binding; and whether it is reasonable is a question of law. (See 11 Rep. 45; Brad. Dist. 171). If several persons be guilty of one offence, they should not be jointly but severally fined; for, as a fine is commonly imposed, not for any general neglect of duty, but for a particular and personal misfeasance, it belongs to the very nature of the offence, that its punishment should be confined to the individual who is guilty of it. (See Brad. Dist. 172).

Fines are generally imposed for acts of contempt and disobedience. (See Brad. Dist. 160; and post, tit. *Fine*).

Courts of record may impose fines; hence, a court leet, being a court of record, and the steward a judge there, he may impose a reasonable fine. (See Cro. Eliz. 581; Moore, 470). But, for an offence out of court, as not coming to do suit there, the steward cannot fine. (Cro. Eliz. 241).

The power of selling a distress for a fine belongs only to a court leet; and, therefore, if it be imposed by a court baron, unless there be a custom or prescription to warrant it, the distress cannot be sold. (See Noy, 17).

† The tenant holding over after notice to quit, without some evidence of the renewal of the tenancy:—Held, not to make him a tenant upon the old terms, so as to entitle the landlord to distrain, his remedy being by use and occupation, or ejectment, or action for double value. (*Jenner* v. *Clegg*, 1832, N. P., 1 M. & Rob. 213).

a will for the arrears of a rent-charge, issuing out of, and charged upon, a messuage and premises in and upon which the distress was made. On demurrer—

Per Cur.—The question is, whether the declaration can be sustained, as it is alleged, that the distress was taken for a rent-charge, which does not fall within the 23rd sect. of 11 Geo. 2, c. 19. On looking at the whole of the statute, there can be no doubt but that a rent-charge falls within that section; and it is necessary, in demonstrating this, to refer to other statutes on the same subject, and, by applying the terms of the one, to put a proper construction on the other. At common law, a distress for rent is in the nature of a penalty; and to prevent inconvenience to landlords, (as, by the common law, a distress for rent in arrear could not be sold), the stat. 2 Will. & Mary, sess. 1, c. 5, was passed; by the second section of which it was enacted, "That where any goods should be distrained for any rent reserved, if not replevied in due time, they might be appraised and sold towards satisfaction of the rent due to the landlord." Although a rent-charge is not referred to in terms in that statute, yet it has never been doubted but that a distress levied for a rent-charge might be sold; and that clause of the statute seems to treat of a distress between landlord and tenant, as it refers to rent reserved and due upon any contract. So, the 3rd section, which provides for the distraining of corn and hay, seems to apply to ordinary cases, as between landlord and tenant. But looking at the whole of the statute of 11 Geo. 2, without reference to the statute of William, there can be no doubt but that a rent-charge falls within the provision of the 23rd section of that act. It has, however, been supposed that a great difficulty would be created by construing two clauses in the same statute differently—viz. the one as remedial, and the other as penal; but no inconvenience will arise from so doing, even if such a construction were put in different parts of one and the same clause; for if one part were penal and the other remedial, the one must be construed strictly and the other liberally. Here, however, the clauses are altogether distinct and separate, and the wording of each shews that a different construction must prevail. The 2nd speaks of rent, quit-rent, reliefs, and other services. Those latter words were introduced to shew that it was intended to be restrained to rent-service alone, so as to exclude a rent-charge; and even if it were not to be construed penally, it would be difficult to say, that it includes a rent of the latter denomination. General terms, however, must receive a general application; and in the 23rd section the word "rent" stands alone, without any terms of qualification or restraint, and the word "services" is altogether omitted. It must be further considered, that this clause embraces a remedial and beneficial law, as the owner of every species of rent is entitled to the security it was intended to afford: and, therefore, a rent-charge was meant to be provided against, as well as every other species of rent.

BUTTERY *v.* ROBINSON, H. T. 1826. C. P. 3 *Bing.* 392.

Rent chargeable upon land under a devise may be distrained for.

DEVISE of lands to A. for life, remainder to B. in fee, subject to and charged with the payment of 20*l.* a year to C. D. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B. In replevin—

Per Cur.—It is impossible to read the words of this will without holding the sum bequeathed a direct charge on the land, which is expressly devised "subject to and charged and chargeable with" the payment of the yearly sum.—Judgment for the avowant.

NEALE *v.* MACKENZIE, E. T. 1834. Ex. 2 *C., M. & R.* 84.

As rent may be apportioned, the lessor may distrain for a portion.

UPON an agreement of demise of a messuage, and — acres of land from year to year, at an entire rent, payable quarterly, the plaintiff, upon entering, found — acres in the occupation of a party entitled under a prior lease, who kept possession during the two first quarters, and excluded the plaintiff from the enjoyment.

The Court held—first, that it was not a case of eviction as to such part by the landlord, but that the rent was apportionable, and the landlord entitled to distrain for such apportioned rent; and secondly, that the lease being capable of operating as a present demise as to part, the lessee entering must be taken to be in possession, and to hold under the lease, so far as it was capable of legal operation.

BRAMSTON *v.* ROBINS, M. T. 1826. C. P. 4 *Bing.* 11; S. C. 12 *Moore*, 68.

But improper deductions sanctioned by the lessor cannot afterwards be distrained for as rent.

IN 1764, a lease was granted of a house, to commence in 1807, for the term of forty-three years, at the yearly rent of 16*l.* clear of all taxes except the land-tax. The plaintiff (the landlord) became seised of the house in 1786, and the defendant (the tenant) became possessed of the term demised in 1822, and from its commencement—viz. in 1807—to that time the rent was paid to the agent of the landlord, who allowed the land-tax to be deducted according to the improved value, and gave receipts accordingly.

The Court held, that these receipts were conclusive as to the payment of rent, and that the landlord could not distrain for the amount allowed for land-tax on the surplus assessment beyond the proportion reserved on the original lease of 1764.

MALLAM *v.* ARDEN, E. T. 1833. C. P. 10 *Bing.* 299; S. C. 3 *M. & Scott*, 793.

If rent reserved in alternative, and landlord accepts it one way, he cannot adopt in future the other without notice to tenant.

BY the agreement of demise, the rent was to be paid quarterly, "or half quarterly if required," and the landlord (the defendant), after receiving it quarterly for the first twelve months, distrained for half a quarter's rent, without any previous notice or demand.

The Court held, that such request was necessary to justify the distress.

(*b*) WITH REFERENCE TO THE PERSONS WHO MAY DISTRAIN.

1. *In general.*

WARD *v.* SHEW, H. T. 1833. C. P. 9 *Bing.* 608; S. C. 2 *M. & Scott*, 756.

An authority to receive rent does not au-

IN an action for an irregular distress, it appeared that the assignees of a bankrupt, in consequence of an arrangement entered into between the bankrupt and his creditors, gave to the bankrupt

thorize the party to distrain.

an authority in writing to receive the rents and arrears of rents due on certain premises, the property of the bankrupt previous to his bankruptcy, couched in the following terms:—"Mr. J. S. having completed an arrangement with Messrs. H. and A., his assignees, for the five houses, &c., (the premises in question), on the 21st day of May inst., and for the arrears of rent due thereon, the tenants on the respective premises are hereby authorized to pay their respective rents to the said J. S., whose receipt shall be their discharge. May 24, 1831. Signed by the solicitors to the assignees."

The Court held, that such authority did not contain a power to distrain, and an action can be maintained against the party who levies a distress under such supposed power.

BRAWLEY *v.* WADE, M. T. 1824. Ex. 1 *M'Clel.* 664.

And a party to distrain must have qua reversion*.

THE landlord had let different parts to the plaintiff and defendant at will, and afterwards agreed by parol that the defendant should become tenants of the whole, but no notice was given to the plaintiff to determine his interest.

The Court held, that the plaintiff having no title to the reversion (qua reversion, which could not pass without deed), had no right to distrain, and the defendant might therefore maintain trespass.

SMITH *v.* DAY, T. T. 1837. Ex. 2 *M. & W.* 684.

But a party seised in fee, by granting a second lease to take effect after the first, does not lose his right to distrain.

THIS was an action against the executors of Sir Haylett Framlingham, deceased, on a bond which had been given by the testator to indemnify the plaintiff against any claim that might be made for the rent of some premises of which he had taken an assignment. The pleas were, first, plenè administravit before the commencement of the suit; and secondly, plenè administravit before any notice of the existence of the bond. Upon the argument a question arose, (which was upon the face of the declaration), whether there was any power of distress, so as to justify the distress made for the rent for the recovery of which this action was brought against the executors. At the trial, it appeared that, during the continuance of a lease from Sir Thomas Wilson to certain parties, he granted another to Sir H. Framlingham, to take effect from the expiration of the first; and it was contended that he had granted away the reversion immediately expectant on the first lease, and therefore had not the power of making any distress for rent in arrear under it. This point was raised, but not very strongly pressed; and the Court expressed an opinion in the course of the argument that there was no assignment of the reversion so as to prevent the power of distress, and therefore that the distress was lawful.

* A tenant from year to year underletting from year to year has a sufficient reversion. (*Curtis* v. *Wheeler*, H. T. 1830, N. P., 1 M. & M. 493). But, where a party entitled to a lease for lives, with perpetual right of renewal, assigned his whole interest, reserving a rent with power of distress:—Held, that there being no reversion he could not avow under 25 Geo. 2, c. 13, (Irish act, corresponding to 11 Geo. 2, c. 19); those statutes being confined to cases where there is a reversion or interest vested in the lessor on the expiration of the lease. (*Pluck* v. *Digges*, 1 Dow & C. 180).

REGNART *v.* PORTER, E. T. 1831. C. P. 7 *Bing.* 451; S. C. 5 *M. & P.* 371.

IN an action of replevin, it appeared that P. and R. entered into an agreement, the former to grant and the latter to take a lease at a certain rent, to commence at a future day; the landlord to make the premises habitable and allow the tenant 15*l.* towards building an oven. R. entered, built the oven, and occupied four years without paying rent, P. not having made the premises habitable. On being called on, R. said he was ready to pay the rent, but insisted on P. performing first his part, and on being allowed sums he had been compelled to lay out.

The Court held, that a distress could not be made for the rent; the circumstances not amounting to an actual existing demise at an ascertained rent.

And there must be an actual demise and an unconditional reservation of a specific rent.

COX *v.* BENT, M. T. 1828. C. P. 5 *Bing.* 185; S. C. 2 *M. & P.* 281.

A TENANT held premises under an agreement for a lease; no rent was paid; but the tenant, in an account stated between him and his landlord, assented to an item therein debiting him for a half-year's rent. In replevin—

The Court held, that the acknowledgment of the account containing an item charging for a half-year's rent was equivalent to an actual payment of it, and clearly, according to the principle of *Knight* v. *Bennett*, (3 Bing. 361), established a tenancy from year to year.

A tenancy may be implied from an item in an account, so as to authorize a distress.

PREECE *v.* CORRIE, H. T. 1828. C. P. 5 *Bing.* 24; S. C. 2 *M. & P.* 57.

IN replevin, it appeared that the landlord had a term in the premises, which expired on the 11th November; and that, on the 11th September previous, he had let the premises orally to the plaintiff, to hold till the 11th November, paying £— rent immediately.

The Court held, 1st, that the agreement amounted to a lease, of which parol evidence might be given, without any assignment made in writing within the Statute of Frauds. 2ndly, That being a demise of the whole interest the defendant could not distrain.

See Poulteney v. *Holmes*, 1 *Stra.* 405; *Smith* v. *Maplebank*, 1 *T. R.* 445.

But under a parol demise the landlord cannot distrain.

GARDINER *v.* WILLIAMSON, E. T. 1831. K. B. 2 *B. & Ad.* 336.

IN trespass, it appeared that by agreement, not under seal, made the 2nd of April, 1829, the defendant agreed to let to the plaintiff, and he agreed to take on lease for three years, the rectory or parsonage of Lindfield, in the county of Sussex, together with all manner of tithes and tenths arising yearly from the lands in the said parish, and also all that messuage situate in Walstead Common, in the said parish, used as a homestead for collecting the tithes, at the yearly rent of 200*l.*, payable quarterly. For rent in arrear under this agreement the defendant distrained; and his so doing was the trespass complained of. For the plaintiff it was contended, that a landlord cannot distrain for tithes, an incorporeal hereditament, unless there be a demise under seal. For the defendant it was answered, that, though the tithes did not pass by the parol agreement, the homestead did; and that, as some portion of the rent accrued due in

Where tithes are demised with other premises by parol, at an entire rent, there can be no distress, as the former could only pass by deed.

respect of that, the distress was lawful. Of this opinion was the learned Judge, who nonsuited the plaintiff.

Per Cur.—It is clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol but by deed only. This agreement, therefore, was void as to the tithes. The entire rent of 200*l.* is reserved in respect of the tithes and of the homestead. Now, assuming that, if tithes be demised together with corporeal hereditaments, the rent issues out of the latter only, here was no valid demise of the tithes, and therefore there was no valid demise of the whole subject-matter; nor was there any distinct rent reserved for that part of it, for which there might have been a legal distress; there could therefore be no lawful distress, unless some ascertained distinct sum had been reserved in respect of the homestead. It follows that the distress cannot be justified.

HOPCROFT *v.* KEYS, M. T. 1832. C. P. 9 *Bing.* 613; S. C. 2 *M. & Scott*, 760.

Under a mere agreement after lease broken, the lessor cannot distrain.

DEFENDANT, having only a defeasible title, demised to plaintiff for years before the first quarter's rent was due. Plaintiff was evicted by title paramount to defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had evicted him by title paramount.

The Court held, that defendant was not entitled to distrain; and that the eviction might be given in evidence on the issue of non tenuit.

WHITEHEAD *v.* TAYLOR, H. T. 1840. Q. B. 2 *P. & D.* 367.

But, if a lessor authorizes a distress, but dies before seizure, if recognized by the executor it will be good.

REPLEVIN. The defendant made cognizance, that the plaintiff was tenant to John Higham, in whose lifetime the rent became due; that John Higham died, having appointed Mary Ann Higham his executrix; and that the defendant made the distress as bailiff of Mary Ann Higham. Plea, that the defendant was not bailiff of Mary Ann Higham. It appeared that John Higham had authorized the making of a distress upon the plaintiff, but had died before the distress was actually made, leaving his wife, Mary Ann Higham, his executrix. The wife before obtaining probate ratified the distress. *Denman*, C. J., thought, that, under these circumstances, the defendant was entitled to the verdict; but he reserved the point for the opinion of this Court, and the defendant had a verdict.

Per Cur.—The evidence in this case shewed that the testator had given the defendant authority to distrain, but died almost immediately before the distress was taken. After it had been taken in the testator's name, the executors fully recognized and adopted the defendant's act of distraining. It was objected, that by the testator's death the authority was revoked; that the executrix had no power to distrain before probate, because she could not maintain an action for the rent at that time; and that the distress being made in the name of one whose authority had expired with his life, could not be ratified by the executrix afterwards. We are of opinion that both these objections are removed by the principle of relation. First, the rent was due to the estate; and the law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate his right is considered as

accruing from that period. If an action, indeed, be brought in that interval, he cannot proceed to declare, because he must make profert of the letters testamentary in his declaration; but that reason does not apply to a distress or any other act performed in assertion of his right as executor. Secondly, the executrix could ratify the act of the defendant as the testator's bailiff, though his authority was at an end; for she might have ratified the act of an entire stranger, as appears by the decision of *Anderson*, C. J., (in which *Perrin*, J., concurred), in an anonymous case in Godbolt's Reports, cited 4 Vin. Abr., tit. *Bailiff*. Such ratification has been held to legalize a past act, even when given after action brought. We, therefore, think that there ought to be no rule. Rule refused.

---

2. *Assignees.*

ROGERS *v.* HUMPHREYS, M. T. 1835. K. B. 5 *N. & M.* 511.

Assignee of a trustee under a power may distrain, notwithstanding the pendency of an action of ejectment by the latter.

BY deed to lead the uses of a recovery certain premises were conveyed to the use of W. H. and T. L., for the term of 1000 years, by way of mortgage; and from and immediately after the determination thereof, and subject thereto, to E. R. for life, with a power to E. R. to grant a lease under certain conditions for seven years after her death. The tenant for life, E. R., executed a lease accordingly, reserving rent to the person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises immediately expectant on the decease of the said E. R.

The Court held, that the assignee of the trustees of the mortgage term for 1000 years was the person entitled to the immediate reversion expectant on the death of E. R.; and although not entitled to the freehold or inheritance, was, notwithstanding the reservation contained in the lease, entitled to distrain upon the tenant for rent in arrear, even though ejectment was pending by the trustees.

---

3. *Executors.*

By 3 & 4 Will. 4 executors may distrain;

BY 3 & 4 Will, 4, c. 42, s. 37, the executors and administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as he might have done in his lifetime.

PRESCOTT *v.* BOUCHER, T. T. 1832. K. B. 3 *B. & Ad.* 849.—
S. P. JONES *v.* JONES, T. T. 1832. K. B. 3 *B. & Ad.* 967.

aliter, before that statute.

ON the question, whether the executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, could distrain for arrears of rent accrued in the testator's lifetime—

The Court held he could not, for the latter was not a tenant in fee-simple of a rent within the meaning of the stat. 32 Hen. 8, c. 37, s. 1.

4. *Joint Tenants and Tenants in Common.*

ROBINSON *v.* HOFMAN, E. T. 1828. C. P. 4 *Bing.* 562. 1 *M. & P.* 474; S. C. 3 *C. & P.* 234.

One joint-tenant may distrain for the entire rent without the assent of his co-tenants.

ACTION of replevin; cognizance by the defendant, as bailiff of Henry Marchant the elder, and Samuel and Stephen Cullum, for 35*l.* for a quarter's rent. Pleas, non tenuit, riens in arrear, and that the defendant was not bailiff as in the cognizance alleged. It appeared that Marchant and the Cullums held the premises out of which the rent accrued as surviving trustees under the will of one John Cullum, deceased. The warrant of distress was signed by Marchant alone; and Samuel Cullum, who was called, said that Marchant had requested him to sign the warrant, but that he had declined to do so, understanding that the rent was payable to another person, and that, as to the distress in question, he had not since recognized the act of Marchant. On this, it was contended for the plaintiff, that the warrant signed by one alone was not a sufficient authority to constitute the defendant bailiff to the three trustees.

By the Court.—One joint-tenant may demand and receive the whole rent due, and may give a discharge binding on his co-tenants; so he may distrain alone, though, it seems, he must avow for himself, and make cognizance as bailiff of the others.

WHITLEY *v.* ROBERTS, H. T. 1825. Ex. 1 *M'Clel. & Y.* 107.

Tenants in common may distrain separately.

IN case for rescue and delay of plaintiff in recovering of rent, which defendant justified under a taking as a distress for poor's rates due from E. J., the tenant in possession of the premises, it appeared that four parties, being tenants in common, had demised them to E. J., under a specific contract to pay the rent to them in four parts, and that whilst the plaintiff, one of the tenants in common, had distrained for his part of the rent, the defendants entered to seize the goods of E. J.

The Court held—first, that the plaintiff's separate distress was lawful; and secondly, that, although the officer might have been justified in seizing the property as still in E. J., though in custodiâ legis, and unaltered by the previous distress, yet he was not justified in selling them unqualifiedly; and that not having acted in obedience to the warrant down to the time of such sale, he was not within the protection of 24 Geo. 2, c. 44, s. 6, and, therefore, the action was maintainable against him.

---

5. *Receiver*.*

* A receiver appointed by the Court of Chancery has a right to distrain for rent without any special authority from the Court for that purpose. (*Bennett* v. *Robins*, T. T. 1832, N. P., 5 C. & P. 379).

6. *Liability of Party authorizing the Distress.*

HART *v.* LEACH, T. T. 1836. Ex. 1 *M. & W.* 560; S. C. 1 *T. & G.* 1010.

A lessor who does not interfere is not liable for the broker's omission to give a copy of his charges.

CASE for an irregular distress. The second count alleged, that the defendant took an unreasonable distress for the arrears of rent, and that the defendant did not give a copy of his charges, and of all the costs and charges of the said distress, or any part thereof respectively, to the plaintiff, and the defendant therein made default. The fourth and sixth counts contained all the different complaints usually made in these actions, concluding with the various grievances and the non-delivery of the copy of the charges. The defendant pleaded to the different counts, so far as they related to the defendant not giving a copy of his charges, and of all the costs and charges of the said distress, that the distress was made by the defendant's direction as landlord of the said tenements, and not personally by him, but by one T. E., being a broker, and the broker of the defendant in that behalf, and who, as such broker, made and conducted such distress for the defendant, and that the defendant did not otherwise make or interfere in the distress, and the said charges and costs were the charges and costs of the said T. E. Verification. To this there was a special demurrer, which alleged only the point which was really to be argued—namely, that the landlord was liable for the neglect of the bailiff.

Per Cur.—We think the statute only applies to the person making the distress—that is, the broker, or the person interfering and assisting him. The words used are, "a copy of his charges." Now, it is only a person who does some manner of work who can have any charges. In regard to the form of the plea, it must be taken to mean, that the defendant did not interfere in the distress from the beginning to the end. Judgment for defendant.

(*c*) WITH REFERENCE TO THE PERSONS WHOSE GOODS MAY BE DISTRAINED.

HORSFORD *v.* WEBSTER, H. T. 1835. Ex. 1 *C., M. & R.* 696.

Where, upon a sale under a distress, the eatage is sold, though the amount turns out insufficient, there can be no distress as against the purchaser.

A CREDITOR of the tenant took a bill of sale of his goods, and growing grass, (eatage), and, upon the landlord putting in a distress, it was agreed that the sale should proceed, and the landlord be paid out of the proceeds of both. The plaintiff having purchased the eatage, and the amount of the proceeds of the sale proving insufficient to satisfy the rent:—Held (diss. *Parke*, B.), that the landlord could not distrain the cattle of the purchaser of the eatage for the rent remaining due, and that the satisfaction of his rent out of the eatage, which he was not by law entitled to, was a consideration for a promise, which a jury might presume from the circumstances to have been made by the landlord not to distrain and deprive the purchaser of the enjoyment of his purchase.

(*d*) With reference to the things which may be distrained*.

Buzzard *v.* Capel, E. T. 1828. K. B. 8 *B. & C.* 141; S. C. 2 *M. & Ry.* 197; S. C. 6 *Bing.* 150; S. C. 3 *Y. & J.* 344.

Barges attached by ropes to a wharf beyond high and low water-mark cannot be distrained.

In trover, it appeared a wharf was demised, with the exclusive use of a barge-way or space between high and low water-mark in a navigable river.

The Court held, that the landlord was not entitled to distrain a barge moored to the wharf by a rope, the barge itself being over the space between high and low water-mark; because a distress at common law must be made in a place which is part of the premises actually demised, and out of which the rent issues, and not in a place wherein the tenant has a privilege of an easement, but which is not actually demised.

(*e*) With reference to the things in the possession of third persons.

Fenton *v.* Logan, E. T. 1833. C. P. 9 *Bing.* 676; S. C. 3 *M. & Scott*, 82.

A threshing-machine let to hire, which was in use on Saturday night, and was to have been returned on Monday morning, when it was seized, may be distrained.

Replevin for a threshing-machine belonging to the plaintiff, which was distrained for rent, on the property of the defendant, under the following circumstances:—The plaintiff was in the habit of letting to hire threshing-machines to the farmers in the autumn, and it was in this way the machine in question came into the possession of, and upon the premises occupied by Farrow. It also appeared, that the work in which the machine was used had been finished on the Saturday. The machine was not seized until the next Monday. It did not appear that there was a sufficiency of other distress upon the premises at the time of making the distress complained of. The jury found their verdict for the defendant.

Per Cur.—The cases referred to in 4 Term Rep. 565, and Willes, 512, are, we think, adverse to the party. The machine was not in actual use at the time of the distress; the use to which it was applied had ceased on Saturday, and it was taken as a distress on the ensuing Monday. Upon a similar principle a horse may be distrained, though not when a man is actually riding him, as the distress might cause a breach of the peace.

* Where the bailiff distrained seized goods privileged:—Held, that, although primâ facie the landlord would be bound by the acts of his bailiff, yet if, when coming to the knowledge of them, he disclaims and repudiates them, he would not be bound by them. (*Hurry* v. *Rickman*, 2 M. & M. 126).

In an action for seizing as a distress a carriage out "on standing" at a coach-maker's, a witness for the defendant having alleged, that the premises on which it was seized were held under a lease:—Held, that it must be produced, and proved in the regular way. (*Shepherd* v. *Cafe*, 1833, N. P., 5 C. & P. 418).

† Corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself. (*Matthias* v. *Mesnard*, T. T. 1826, N. P., 2 C. & P. 353).

WOOD *v.* CLARKE, T. T. 1831. Ex. 1 *C. & J.* 484; S. C. 1 *Tyrw.* 314.

DECLARATION in replevin for a stocking-frame, being in the dwelling-house of one W. D., in &c. Avowry, that defendant took the frame as a distress for rent of the said dwelling-house in arrear from the said W. D. Plea, that the said W. D., before and at the said time when, &c., was a stocking-weaver, and the business and calling of a stocking-weaver then carried on, of which premises the defendant had notice; and the plaintiffs, shortly before the said time when &c., did, in the way of their said trade, employ the said W. D. in the way of his said calling, as their workman, for certain wages in that behalf, to weave and manufacture into stockings, at his dwelling-house, being the said dwelling-house in the said declaration mentioned, certain worsted yarn of the plaintiffs; and for that purpose they, the said plaintiffs, before the said time when &c., had delivered to the said W. D. the said worsted yarn of the said plaintiffs, together with the said stocking-frame, in order that the said W. D. might, in his said dwelling-house, use and work the said last-mentioned stocking-frame.

So, knitting-frames in the possession of a stocking-weaver belonging to his employer, are not privileged.

The Court held, that materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due from the weaver to his landlord; but a frame or other machinery delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house, in the manufacture of such materials, is not privileged, unless there be other goods upon the premises to satisfy the rent due.

ADAMS *v.* GRANE, H. T. 1833. Ex. 1 *C. & M.* 380.

IN case, it appeared that a manufacturer sent goods to a public auction-room to be sold by an auctioneer who had hired the rooms for a short period, and who advertised the intended sale of these and other goods received in the same way, "under an assignment for the benefit of creditors." The goods having been distrained for rent due for the auction-room from the party of whom it was hired—

But the protection of goods in the hands of a factor apply to an auctioneer; and, therefore, property sent for sale cannot be distrained.

The Court held that they were privileged from distress, as goods deposited for sale by auction on the premises of an auctioneer are not liable to be distrained for rent in arrear in respect of those premises; nor will a misrepresentation as to the ownership made by the auctioneer in advertising the sale, although it might vitiate the sale as between buyer and seller, destroy the exemption from distress.

BROWN *v.* SHEVILL, M. T. 1834. K. B. 4 *N. & M.* 277; S. C. 2 *Ad. & E.* 138.

THIS was an action brought by the plaintiff against the defendant for taking as a distress for rent the carcass of a bullock which was the property of the plaintiff, then on the premises in the occupation of the tenant. It appeared that the bullock had been sent by the plaintiff, who was a butcher, to the premises of the tenant Woodhouse, who was likewise a butcher, to be slaughtered, and that it was hanging up in the shop when it was distrained for rent in

So, an animal sent merely to be slaughtered cannot be distrained.

arrear some short time after it was brought from the slaughter-house.

Per Cur.—We are of opinion, that the carcass was privileged on the general ground that it was in the hands of Woodhouse, in the way of his trade, for him to do something upon it in the way of his trade. With respect to the case of the chariot in the yard of a livery-stable keeper, it was there merely for custody, and not for any thing to be done to it in the way of his trade.

(*f*) WITH REFERENCE TO THINGS IN THE CUSTODY OF THE LAW*.

(*g*) WITH REFERENCE TO THE PLACE IN WHICH A DISTRESS MAY BE MADE†.

(*h*) WITH REFERENCE TO THE PERIOD LIMITED FOR MAKING A DISTRESS‡.

By 3 & 4 Will. 4, arrears of rent may be distrained for within six months after end of the term.

BY 3 & 4 Will. 4, c. 42, it is enacted, that "arrears of rent may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to distresses so made."

NUTTALL *v.* STAUNTON, E. T. 1825. K. B. 4 *B. & C.* 151.

The statute of 8 Anne, c. 14, authorizing a distress within six months after the end of the

A TENANT, by agreement with a landlord, remained in possession of part of a farm after expiration of his tenancy, the latter distrained on the premises within six months after such expiration. In replevin, on demurrer—

The Court held, that two questions arose on the construction of

* Property in the custody of the law cannot be distrained; hence, corn taken under a fieri facias in the hands of the sheriff's vendee is protected from the landlord's distress for rent subsequently accruing, unless such purchaser allow it to remain on the ground an unreasonable time after it is ripe; (*Peacock* v. *Purvis*, M. T. 1820, C. P., 2 B. & B. 362; S. C. 5 Moore, 79.—S. P. *Parslow* v. *Cripps*, H. T. 1708, 1 Com. 204); or the execution be fraudulent; (*Smith* v. *Russell*, H. T. 1811, C. P., 3 Taunt. 400); but as soon as the party has waived his execution, the landlord's right to distrain revives. (*Steven* v. *Mihill*, T. T. 1756, K. B., 1 Kenyon, 370).

† A distress may be made in a house or other enclosed place. (See Brad. Dist. 136). A distress cannot be made on the highway, unless at the instance of the King. (See Brad. Dist. 132).

‡ A party occupied premises under an agreement for three years, at 45*l.* a year, which expired at Midsummer, 1826; then he did not go out, nor did his landlord take any steps to compel him, but, at the Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50*l.* a year. He continued in, but refused to pay more than the 45*l.* rent:—Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.* which might be distrained for. (*Roberts* v. *Hayward*, E. T. 1828, N. P., 3 C. & P. 432).

sections 6 & 7 of the stat. of 8 Anne. First, whether to bring a case within that act the holding over by the tenant must be a tortious holding over; and, secondly, whether the holding over must be of the whole, and not of a part only, to come within that act. There is nothing in that statute which requires the holding over to be tortious or other than permissive; or confining it to cases of holding over the whole.

term is not to be continued strictly.

KNIGHT *v.* BENNETT, H. T. 1826. C. P. 3 *Bing.* 361; S. C. 11 *Moore*, 227.

REPLEVIN for taking a rick of corn belonging to the plaintiff, standing in a certain field, being parcel of the said farm called Hanbrook Farm. The defendant avowed the taking for half-a-year's rent due and ending at Michaelmas, 1824, under a demise to the plaintiff at the yearly rent of 188*l.*, payable half-yearly, at Lady-day and Michaelmas. The plaintiff pleaded non tenuit, and paid 220*l.* into court, which was sufficient to cover the rent alleged to be due at Michaelmas, 1824. It appeared that the plaintiff had given up the possession of the farm to the defendant at Michaelmas, 1824, under a regular notice to quit; that by the custom of the country he was to have the use of the barns and gate-rooms for the purpose of threshing out his corn and foddering his cattle till old May-day following; that, at the expiration of the term at Michaelmas, the defendant obtained an injunction from the High Court of Chancery, restraining the plaintiff from carrying off corn in the straw from the premises; that the rick in question was accordingly left, and which was distrained by the defendant in January, 1825.

A landlord may distrain after the end of the demise, if sanctioned by custom.

The Court held, first, that a custom for a tenant to have the use of the barns and gate-rooms for the purpose of threshing out his corn and foddering his cattle, is a prolongation of the original term; and secondly, that the landlord might distrain any time between Michaelmas and May-day for the rent due at Michaelmas preceding.

TAYLERSON *v.* PETERSON, H. T. 1838. Q. B. 7 *Ad. & E.* 110; S. C. 2 *N. & P.* 622.

THE plaintiff, a few days after his lease expired, gave up possession to the incoming tenant; but, without the latter's permission, left some cattle in the fold yard, which were afterwards distrained in the name of the landlord.

An outgoing tenant by leaving some of his stock on the premises does not so continue the tenancy as to authorize a distress by the landlord.

The Court held, that the plaintiff was not possessed of the premises, that the grazing of the cattle thereon did not constitute a possession under 8 Anne, c. 14, ss. 6, 7, and that the distress was consequently illegal.

(*i*) WITH REFERENCE TO THE MODE OF CONDUCTING A DISTRESS.

1. *What amounts to.*

WOOD *v.* NUNN, M. T. 1828. C. P. 5 *Bing.* 10; S. C. 2 *M. & P.* 27.

IN the morning of the day in which a formal distress was made, the landlord, hearing that property was about to be removed, and

The landlord putting his

hand on an article, and saying, "it shall not be removed until my rent is paid," constitutes a distress.

his tenant and a third party disputing about the property in a lathe, laid his hands on it, saying, "It shall not be removed until my rent is paid."

The Court held, that there being no collusion between the landlord and the tenant, the distress was to be taken to have commenced at the time of the landlord's coming on the premises, and the lathe having been improperly removed, he had a right to recover it back in trover.

THOMAS *v.* HARRIES, T. T. 1840. C. P. 1 *Scott*, 524; S. C. 1 *M. & G.* 695.

So, going into a field, and touching one of the cattle in the name of the rest, and then leaving the cattle there, but giving notice to the tenant, is a sufficient distress.

IN replevin, it appeared that the baliff distrained for rent in the following manner:—He went a little way into the field where the cattle were, and touching one of the beasts upon the side, said, "he distrained for rent;" he then took a list of the cattle upon paper, but he made no change whatever in their situation and position, and left the gate of the field as he found it, unlocked, and without any additional fastening; he then gave notice of distress to the tenant, informing him, that, if rent and costs, &c., were not paid, he would sell in five days. The notice also stated, that the cattle were impounded upon the premises, but did not say where; he himself remained in charge of the cattle for some time, and when he left he was succeeded by another person.

The Court held (dissentiente *Maule*, J.), that, under these circumstances, the impounding of the cattle was complete and perfect from the time of giving notice to the tenant; and, consequently, a tender of the rent and costs of distraining, &c., after such incident was too late.

SWANN *v.* EARL OF FALMOUTH, T. T. 1825. K. B. 8 *B. & C.* 456.

There may be a good seizure, although no person remains in possession.

IN case for an excessive distress, it appeared that the goods consisted of a quantity of coals lying in heaps. The defendant's bailiff came on the premises, went round the heaps, but did not touch them; and left a notice in the usual form, "Take notice, that I have taken and distrained," &c., and "I have left them on the premises, and unless," &c., giving the usual notice of sale. He then left the premises, but did not leave any one in possession. There was, subsequently, a public announcement by the defendant's people that the coals would be sold; but, at the request of the plaintiff, the day was postponed, and handbills were accordingly printed and published, intimating the postponement.

Per Cur.—We think, that, as between the landlord and the tenant, it is not necessary for a person to be left in possession of goods distrained for rent, and left on the premises. The tenant meddling with such goods would be liable to punishment for pound-breach, provided the facts did not shew any intention on the part of the distrainer to abandon the distress.

RUSSELL *v.* RIDER, E. T. 1834. N. P. 6 *C. & P.* 416.

After man in possession has quitted pre-

IN case, it appeared that a broker's man having taken possession of property under a distress for rent, after remaining two days left the house in a state of excitement bordering on insanity. The

landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house, and took away the goods without any previous demand of admission.

mises for several days, the landlord no right to re-enter by violence.

Bosanquet, J., held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them.

---

2. *Of the Demand* and Tender of the Rent.*

SMITH *v.* GOODWIN, H. T. 1833. K. B. 1 *N. & M.* 371; S. C. 4 *B. & Ad.* 413.

THE plaintiff was tenant to the defendant Goodwin of certain premises at the rent of 25*l.* per annum. Half a year's rent was due at Midsummer, 1831. On the 31st August, the defendant authorized the other defendant Richards to distrain, and he accordingly did. On the 2nd of September, the plaintiff tendered to the defendant Goodwin twelve sovereigns and a half for the rent, and thirteen shillings for the expenses. The defendant refused to take it, saying he had turned the business over to Richards, and referred the plaintiff to him. The next day the same sum in amount was tendered to the man in possession, the plaintiff demanding a receipt to be signed by Richards. The latter could not be found at the time, and the plaintiff took the money away.

A tender to the landlord after distress is sufficient†.

Per Cur.—The tender to the landlord was sufficient, as appears by the case of *Moffat* v. *Parsons*, (5 Taunt. 207), although he had put the business into the hands of his broker. A landlord need not be under any difficulty as to the proper amount of the charges; he may ascertain it himself from his broker.

---

3. *By whom*‡.

BEGBIE *v.* HAYNE, T. T. 1835. C. P. 2 *Bing. N. S.* 124.

REPLEVIN. The defendant made cognizance as the bailiff of R. T. and C. S., assignees of the estate, &c., of one Evans, a bankrupt,

Bailiffs to lords of courts, &c.,

* The making a distress being considered as a legal demand, no other demand is generally requisite, unless there be a reservation requiring a special demand; hence, a clause in a lease, that the lessor might distrain for the rent, "being lawfully demanded," was holden not to require a request previous to the distress. But where the clause was, if the rent were behind it should be demanded at a particular place not on the land, or be demanded of the person of the tenant, a special demand was deemed essential to support a distress. (See Bac. Ab., *Condition*, (A. 2); Hob. Rep. 208; Plowd. 69). In these cases, where a demand is necessary, it need not be made the day the rent becomes due, but at any subsequent time. (See Hob. 207). No landlord can distrain after the tenant has, upon the land, tendered the rent. (See 8 Co. Rep. 147; 2 Inst. 107). And even if the tender be made after the distress, but before impounding, the landlord is, it seems, not justified in detaining the property. (See Ibid.)

† Trespass lies when the amount of the rent is tendered after the distress, but before impounding or removal. (*Vertue* v. *Beasley*, 1830, N. P., 2 M. & M. 21).

‡ The bailiff must be authorized by a written authority from the landlord. (See Brad. Dist. 217). And if required, he is bound to shew his authority; if

only, and not common bailiffs, are within the 13 Ed. 1, c. 37.

for rent due to Evans before his bankruptcy, and to his assignees after. Plea in bar, that defendant ought not, &c., as bailiff, to acknowledge the taking of the goods in question, because, at the time, &c., the defendant was not a bailiff sworn and known according to the provisions of the statute passed in the 13th year of the reign of Edward I., c. 37, formerly King of England, and intituled "that no distress shall be taken but by bailiffs sworn and known." Demurrer and joinder.

Tindal, C. J.—As it appears to me, the Statute of Westminster the 2nd does not apply, nor was it ever intended to apply, to private distresses. For the purpose of understanding the intention of the legislature in the 37th chapter of the statute, let us take into consideration the 30th and 38th chapters of the same enactment, and the application of the rule noscitur è sociis will, I think, prove the correctness of the proposition. The 30th speaks of lords of courts, and others that keep courts, and stewards, intending to grieve their inferiors; and the 38th refers to sheriffs, hundredors, and bailiffs of liberties, who have used to grieve those who are in subjection to them. Now, these chapters evidently point out process in some court; and taking things in their natural order, we must, I think, conclude that the 37th is applicable to distresses of a similar description.

---

4. *At what Time to be made.*

ALDENBURGH *v.* PEAPLE, H. T. 1834. N. P. 6 *C. & P.* 212.

A distress cannot be made after dark.

IN trespass, it appeared that, at about eleven o'clock on the night of the 13th of July, 1833, the defendant, seeing the plaintiff's son go into the house and leave the key in the door, took possession of the key, and kept the plaintiff out of the house, alleging that he took the goods as a distress for rent.

Per Parke, J.—With respect to the taking of the goods, that cannot be justified as for a distress, because no one has a right to make a distress after dark.

---

5. *Of breaking open Doors, &c.*.*

not, he may distrain generally, (see Leon. 50), by taking some articles of furniture in lieu of the whole. (See Brad. Dist. 216). The distress may be made by the person to whom the rent is due, who has no particular form to observe,—he has merely to take some article of furniture in the name of all the goods on the premises. (See Brad. Dist. 216).

* The party making a distress may, if the outer door be open, break the inner doors. (*Browning* v. *Dane*, M. T. 1735, K. B., Ca. temp. Hard. 107). And trespass will not lie against a landlord for entering a divided lower apartment through his own boarded and unceiled floor to distrain for rent. *Gould* v. *Bradstock*, T. T. 1812, C. P., 4 Taunt. 562).

Where the defendant, with others, entered the premises in the absence of the plaintiff, his tenant, rent being due, and called in a police officer:—Held, that he could only justify doing so as necessary under the apprehension of violence or resistance; and that the jury must be satisfied that the entry was connected with his exercise of the right of distress; but that, if it were so, his putting up a bill in the window for letting the premises would not create a new trespass. (*Skidmore* v. *Booth*, 1834, N. P., 6 C. & P. 777).

6. *Of the Inventory**.

7. *Of the Notice.*

GAMBRELL *v.* EARL OF FALMOUTH, M. T. 1836. K. B. 4 *Ad. & E.* 73.

IN an action on the case for an excessive distress, the defendant pleaded, that the whole sum distrained for was due and in arrear.

The Court held, that he was not precluded from taking into the account arrears antecedent to a prior distress, although the notice under such prior distress stated it to be for rent due up to a certain period, and the notice under the latter distress stated it to be for rent accrued since the former distress.

An error in the notice as to the time the rent was due, is not material†.

8. *Of the Appraisement*‡.

NOTTS *v.* CURTIS, E. T. 1832. Ex. 2 *Tyrw.* 449.

TRESPASS on the case for taking an excessive distress, with counts for distraining for more rent than was due, for selling under the best price that could be obtained, for selling without having had the goods duly appraised; and a count in trover. It appeared that the defendant had distrained for 3*l.* more than was really due; that he had sold by auction goods worth 15*l.* for 6*l.*, which was the best price that could be obtained for them under the circumstances; and that the sale had taken place without any previous appraisement.

Per Cur.—The omission to have the goods appraised is not a mere irregularity, but renders the whole proceeding void.

An appraisement before sale is indispensable, and a sale without is wholly illegal.

ALLEN *v.* FLICKER, M. T. 1839. Q. B. 10 *Ad. & E.* 640.

CASE for irregular distress, and for not employing two sworn appraisers. (2 W. & M., sess. 1, c. 5). Plea, that the distress was made for arrears under 20*l.*, viz. an arrear of 1*l.* Demurrer.

Per Cur.—It may have been the intention of the legislature in

The 57 Geo. 3, does not repeal the 2 W. & M. c. 5, as to distresses under 20*l.*; and an appraisement

* The inventory should describe the articles distrained; as, in the parlour, one table, &c. (See Brad. Dist. 219). Merely making an inventory does not so far implicate the maker as to subject him to an action if the distress be irregular. (*Ward* v. *Hagden*, E. T. 1796, K. B., N. P., 2 Esp. 552).

If goods are removed by the landlord, which were not originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them. (*Bishop* v. *Bryant*, T. T. 1834, N. P., 6 C. & P. 484).

† A notice of distress for more rent than due, if no more goods be distrained than to cover the amount of rent, seems not to vitiate. (*Wilkinson* v. *Terry*, 2 M. & Rob. 377).

‡ Under the 57 Geo. 3, c. 93, as to distresses under 20*l.*, an appraisemen by one broker is sufficient. (*Fletcher* v. *Saunders*, 2 M. & Rob. N. P., 375, and C. & P. 747; S. P. *Bishop* v. *Bryant*, 1834, 6 C. & P., N. P., 484).

Where the sale by the landlord was illegal for want of appraisement:—Held, that the tenant was entitled to recover the difference between the actual value and the price for what the goods sold, although no specific damage was stated, it being the result of the illegal sale. (*Knotts* v. *Curtis*, 1832, N. P., 5 C. & P. 322).

The constable must attend and swear the appraisers *before* they make the appraisement. (*Kenney* v. *May*, 1830, N. P., 2 M. & M. 56).

by one broker is insufficient, unless by consent.

framing the 57 Geo. 3, c. 93, to exempt the landlord from the expense of employing two appraisers, where the sum was less than 20*l.*; but such an intention is not carried into execution by the introduction of such words as these into a schedule. It might as well be contended from the words, "one broker or more," that all appraisers must be brokers.

---

9. *Of the Sale*.*

---

10. *Of the Surplus.*

LYON *v.* TOMKINS, T. T. 1836. Ex. 1 *M. & W.* 603; S. C. 1 *T. & G.* 810.

The surplus means after satisfying the rent and reasonable charges.

THE plaintiff, in an action for an illegal distress, complained that the defendant did not leave the overplus after payment of the arrears of rent, and the charges of the distress, in the hands of the sheriff or constable for the use of the owner of the goods, although a reasonable time had long since elapsed. It appeared that a distress had been levied upon the plaintiff's goods, which were sold by auction, and some articles were added at the request of her agent and also sold. Some days after the sale, her son applied for an account of the result of the sale, received the balance remaining after payment of the arrears of rent and the charges, without making any complaint of excessive charges.

The Court held, that it ought to have been submitted to the jury to say, whether this was received by the plaintiff in satisfaction of her right of action for the non-payment to the sheriff or constable, and whether the sum paid was the real surplus.

---

11. *Of the Charges to be paid to the Distrainer†.*

* The landlord is bound to wait five whole days of twenty-four hours before he sells: hence, if goods be taken on the 1st March, at two o'clock, and sold before that hour on the 5th day:—Held, that the tenant was entitled to recover, though only nominal damages. (*Harper* v. *Taswell*, 1833, N. P., 6 C. & P. 166).

† By 2 W. & M. c. 5, the charges of the distress, appraisement, and sale, are to be satisfied out of the things sold; and by the 57 Geo. 3, c. 93, s. 1, no person making any distress for rent where the sum shall not exceed 20*l.*, to take other charges than mentioned in the schedule annexed; nor to charge for any act not done. By sect. 2, party aggrieved by such practice may apply to a justice of the peace, who may adjudge treble the amount of the monies unlawfully taken, to be paid with costs, which may be levied by distress. And by sect. 3, such justices may summon witnesses; and, if they neglect to attend, may impose a penalty on them not exceeding 40*s.* By sect. 4, if complaint be unfounded, the justice may give costs to the party complained against; but no judgment to be given against any landlord unless he personally levies the distress. And this act is not to bar parties of other legal remedies. By sect. 5, the signature of the justice is directed to be attached to the judgment; and by sect. 6, the brokers are to give copies of their charges to the persons whose goods have been distrained.

(*j*) With reference to, when the goods are already in execution.

Wray *v.* Earl of Egremont, M. T. 1832. K. B. 4 *B. & Ad.* 122; S. C. 1 *N. & M.* 188.

In trover, it appeared that Catton had been tenant to the defendant; and that at Lady-day, 1831, rent to the amount of 278*l.* 10*s.*, at the rate of 116*l.* 10*s.* per annum, was in arrear; and that on the 29th of August a distress was put in for the whole sum. On the 30th of August Catton was arrested, and on the same day signed his petition, assignment, and other papers, to the Court for relief of Insolvent Debtors, and the defendant received a notice not to proceed to sell. On the 5th of September the defendant sold, and realised 210*l.* 19*s.* Catton was afterwards discharged by the Court for Insolvent Debtors. The plaintiff was nonsuited; with leave to move to set aside the nonsuit and enter a verdict for the sum exceeding a year's rent.

The landlord's right to only one year's rent does not apply where the arrest takes place after the distress under the Insolvent Act, 7 Geo. 4, now repealed*.

Per Cur.—The 7 Geo. 4. c. 57, applies only to such distresses as are made and levied; that is, that are commenced to be levied after the arrest, so that the right at common law remained. This was a distress made before but levied after; the object was to make the landlord lose no time in coming in, that he should not wait until the insolvent had gone to prison, and then come in and seize the whole proceeds.

Wright *v.* Dewes, T. T. 1834. K. B. 3 *N. & M.* 790; S. C. 1 *Ad. & E.* 641.

This was an action of trespass. The sheriff sold to the plaintiffs, who were joint creditors of the tenant in possession, "so many acres of fallow wheat and so many of buck wheat," in consideration of the sum indorsed upon the writ to be levied. The landlord, before the corn was ripe, distrained it for rent due subsequent to the sale.

Rent was satisfied up to the time of growing crops being taken in execution and sold: —Held, that they could not be distrained for subsequent rent.

The Court held, 1st, that the distress was ill; and 2nd, that the statute of 56 Geo. 3, c. 50, which prevents a sheriff from selling "straw or straw of crops growing," except on agreement to be entered into to consume them upon the premises, does not apply to such a case.

(*k*) With reference to the making several distresses for the same rent†.

(*l*) With reference to the making a joint distress for several rents‡.

* By 1 & 2 Vict. c. 110.

† A second distress cannot be made if enough might have been taken at first, unless the distrainor mistake the value of the goods. (*Hutchard* v. *Whitaker*, E. T. 1758, K. B., 1 Burr. 578; S. C. 2 Kenyon, 204).

‡ A joint distress for distinct rents cannot be made. (*Rogers* v. *Berkmire*, E. T. 1735, K. B., 2 Stra. 1040; S. C. Ca. temp. Hard. 145).

(*m*) With reference to a fraudulent removal.

Rand *v.* Vaughan, E. T. 1835. C. P. 1 *Bing. N. S.* 767; S. C. 1 *Scott*, 670.—S. P. Watson *v.* Main, 3 *Esp. N. P. C.* 15.

To constitute a fraudulent and clandestine removal the rent must be due*,

Trespass for breaking into plaintiff's house and seizing and taking goods. Plea, justifying the entry; and that the goods were removed to avoid a distress. Replication, that he the plaintiff, as in the said plea alleged, conveyed and carried off and from the said premises, so held and enjoyed by him as aforesaid, the said goods and chattels in the said declaration mentioned on the 24th day of March, 1834, which day was a day and time before the said rent became due and payable, and before the same was due, in arrear, and unpaid; without this, that the plaintiff conveyed away and carried off or from the said demised premises the said goods and chattels at any time before the said rent became or was due and payable, or when the same was in arrear or unpaid in manner and form as alleged.

The Court held, that the stat. 11 Geo. 2, c. 19, did not apply to cases where a tenant fraudulently and clandestinely removes his goods before the rent becomes due; and therefore the landlord cannot follow and distrain such goods.

Parry *v.* Duncan, E. T. 1830. C. P. 7 *Bing.* 243; S. C. 5 *M. & P.* 19; S. C. *M. & M.* 533.

and the removal secret.

Upon an issue in replevin upon 11 Geo. 2, c. 19—

The Court held, that the defendant must establish that the goods were removed fraudulently, and with the view to elude a distress; where the proof was that only some goods had been removed from the premises openly, and the jury negatived that any rent was due, the Court refused a new trial on payment of costs: the Court, in a doubtful case, would not, by the result of another trial, subject the plaintiff to double costs, and revive the liability of the sureties, especially as the landlord might still have recourse to an action for use and occupation, if rent was really due.

Brooke *v.* Noakes, T. T. 1828. K. B. 8 *B. & C.* 537.

To render a party liable for

In debt, founded on the stat. 11 Geo. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal

* The right to follow goods clandestinely removed applies only to the property of the tenant, not of a stranger or a lodger. (*Postman* v. *Harrell*, 1833, N. P., 6 C. & P. 225).

Upon the construction of sects. 3 and 4 of 9 Geo. 2, c. 11:—Held, that the landlord may elect which remedy he will pursue in cases of fraudulently removing goods to prevent distress, by action or by complaint to two magistrates, notwithstanding the goods do not exceed the value of 50*l.* (*Bromley* v. *Holden*, 1828, N. P., 1 M. & Malk. 175).

In replevin upon goods distrained off the premises under 11 Geo. 2, c. 1, as on a fraudulent removal:—Held, that it must be shewn that there was not a sufficient distress left on the premises; the justification failing unless it be established that the defendant is without remedy except by action. (*Parry* v. *Duncan*, 1830, N. P., 1 M. & M. 533, supra).

of his goods, with intent to prevent the landlord from distraining them—

assisting in a fraudulent removal, it must appear that he assisted to prevent a distress*.

The Court held, that it ought to have been proved, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining. Now, here there was no evidence which ought to have satisfied the jury that the defendant assisted in the removal of the cattle; and, therefore, that the defendant ought not to be visited with the penal consequences of this act of Parliament, unless it be distinctly shewn that he was privy to the fraudulent intent with which the tenant's cattle were removed.

REX *v.* DAVIS, M. T. 1833. K. B. 2 *N. & M.* 349; S. C. 5 *B. & Ad.* 551.

Under 11 Geo. 2, c. 17, the relationship between landlord and tenant must appear on face of justices' order†;

A CONVICTION under 11 Geo. 2, c. 19, s. 4, against A. B. for fraudulently and clandestinely removing goods from off the premises to prevent C. D. from distraining, stated, that A. B., "upon a complaint duly made and exhibited," was charged, and it appeared and was proved, that he did so fraudulently and clandestinely remove, &c.—

The Court held, that the justices having no jurisdiction, except where one party is landlord and the other tenant, it must appear upon the face of their order, that the party removing was tenant, and it cannot be supplied by intendment.

REX *v.* RABBITTS, M. T. 1825. K. B. 6 *D. & R.* 343.

but need not specify the value.

ON an order and adjudication under 11 Geo. 2, c. 19, s. 4, for clandestinely and fraudulently removing goods under 50*l.* to prevent distress for rent—

The Court held, that such goods need not be specified in the order; it was sufficient for the justices to find their value.

COSTER *v.* WILSON, E. T. 1838. Ex. 3 *M. & W.* 411.

On an information for fraudulent removal, the justices may adjudicate under the 11 Geo. 2, though the title to the premises may be in dispute.

IN trespass against justices of the peace, it appeared that an order of justices, made under 11 Geo. 2, c. 19, s. 4, recited, that the goods removed by the tenant were under the value of 50*l.*, and that the party seeking the order had exhibited a complaint in writing. Upon refusal to obey the order, a warrant of commitment was made out, and the party charged by it sent to gaol.

The Court held, that the justices have jurisdiction to inquire into and adjudicate on an information for fraudulent removal under 11 Geo. 2, c. 19, s. 4, notwithstanding the title to the premises is in dispute, and the rent has been paid to one of the claimants; and

* A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C. A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them:—Held, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover. (*Whitworth* v. *Smith*, T. T. 1832, N. P., 5 C. & P. 250; S. C. 1 M. & Rob. 193).

† A conviction upon the 11 Geo. 2, for a fraudulent removal, must state that the offender "wilfully and knowingly" assisted, &c. (*Reg.* v. *Justices of Radnor*, M. T. 1840, B. C., 9 D. P. C. 90).

that the justices were not liable in trespass. Whether the removal is bonâ fide or fraudulent is for their determination.

BOWLER *v.* NICHOLSON, M. T. 1840. Q. B. 4 *P. & D.* 16.

To trespass, plea, that the goods had been fraudulently removed to avoid a distress, is sufficient*.

To an action of trespass for entering plaintiff's house and taking goods, plea, that the goods had been fraudulently removed from other premises of another party to avoid distress for rent—

The Court held the plea sufficient, although the plea did not state either the date of the demise nor the term, but merely followed the statute in stating a demise, an arrear of rent for a certain time, being portion of the term, a fraudulent removal, and an entry for the purpose of following the goods removed; and that the replication de injuriâ was bad, as it ought to shew in what respect the answer set up by the plea was bad; held also, that, on special demurrer, the plea might have been bad in not more particularly setting out the title; but the distinction is between a justification in trespass and an avowry; in the latter a good title must be set out, in the other it need only be shewn that the party is not trespasser.

VIII. EXCESSIVE.

CARTER *v.* CARTER, T. T. 1828. C. P. 5 *Bing.* 406; S. C. 2 *M. & P.* 723.

Distraining for the whole amount of rent instead of a balance, which has been tendered, is an excessive distress†.

THE plaintiff, the occupier, although not actually distrained upon for the ground-rent, upon its being demanded asked for time, at the end of which he paid it.

The Court held, that it was not to be deemed a voluntary payment; and that the defendant, the immediate landlord, having refused to allow that as well as land-tax, as payment upon the next half-year's rent becoming due, the balance being tendered and refused, but distrained for the whole rent, the action for an excessive distress was maintainable; if the whole distress was wrongful, the count in trover was sufficient.

PIGGOTT *v.* BIRTLES, T. T. 1835. Ex. 1 *M. & W.* 441.

An action lies for taking growing crops and beasts when the former would have

THE landlord seized growing crops, and also beasts of the plough, and the jury found that the former were capable of being valued at the time of seizure, and of so much value as to make the distress excessive.

The Court held, first, that, as the tenant must be subject to some

* Plea in trespass, justifying the seizing goods as being fraudulently removing to avoid distress:—Held, that the 11 Geo. 2, c. 19, s. 7, is satisfied by calling in a party appointed a special constable for the occasion, although not a regular peace officer. (*Cartwright* v. *Smith*, 1833, N. P., 1 M. & Rob. 284).

† In an action for taking an excessive distress, the question is as to what sum the goods seized would have sold for at a broker's sale, not the value to an incoming tenant. (*Wells* v. *Moody*, 1837, N. P., 7 C. & P. 59).

In case for an excessive distress, the question is, whether the goods taken are more than sufficient to satisfy the sum really due, although the warrant may be for a larger sum than is actually due. (*Crowder* v. *Self*, 1834, N. P., 2 M. & Rob. 190).

inconvenience from taking too large a distress of such a nature, and some damage therefore be sustained, an action would lie for such excessive distress, but that the measure of damages was not the full value of the crops, but the inconvenience and expense which the tenant sustained in losing the dominion and management of the crops, or, if he had replevied, in being put to procure sureties in a larger amount than he would otherwise have been: secondly, that the landlord having a right to resort to subjects of distress immediately available, he was not liable to an action for distraining beasts of the plough, where the other sufficient distress included growing crops.

been sufficient to satisfy the arrears.

IX. OF THE EFFECT OF*.

X. OF THE WAIVER OF.

DAVIS *v.* GYDE, E. T. 1835. K. B. 4 *N. & M.* 462.

To an avowry for rent in arrear, the plaintiff pleaded, that he gave a promissory note, which at the time when, &c., had to run, &c., which the defendant received "for and on account" of the rent in arrear. On demurrer—

A promissory note does not extinguish the remedy for rent by distress.

The Court held, that the plea in bar is insufficient; that rent is in the nature of a specialty, (*Gage* v. *Aston*, Com. Dig. "*Administration*," C. 2), and is in equal degree with a specialty, although reserved by parol. "Then, supposing that this is to be considered in the light of a specialty debt, the question is, whether this promissory note, which is in the nature of a simple contract debt, could be given in evidence in answer to an action on bond or other specialty. (Com. Dig. "*Pleader*," 2, N. 46). Upon this there can be no doubt; and in *Hagford* v. *Andrews*, (Cro. Eliz. 697), it was held, that to debt on bond conditioned for payment at a certain day, a plea that the plaintiff gave a longer day of payment was bad; (*Mease* v. *Mease*, Cowp. 47, and the cases there cited): all seem to shew that, if a claim be on a specialty, the time of payment cannot be extended by parol.

See Palfrey v. *Price*, 3 *Price*, 572; *Skerry* v. *Preston*, 2 *Chit. Rep.* 245.

XI. OF A RE-TAKING. See also, tit. *Rescue*.

RICH *v.* WOOLLEY, T. T. 1831. C. P. 7 *Bing.* 651; S. C. 5 *M. & P.* 663.

IN trespass for breaking and entering the plaintiff's close—

To justify a re-capture, it must appear to have been made on fresh pursuit; and if a close

The Court held, that where goods are fraudulently removed to prevent a distress for arrears of rent, the landlord is not justified in breaking open the locked gate of the close where the goods are without first calling to his assistance the constable, and complying

* In an action for use and occupation, it is no answer that the landlord distrained for the rent, and that the goods, if properly sold, would have been sufficient to discharge the rent. The tenant's remedy, if aggrieved by an under sale, is by action. (*Efford* v. *Burgess*, 1830, N. P., 2 M. & M. 23).

be broken open, that a constable was present.

with all the conditions in 11 Geo. 2, c. 19, s. 7. The re-taking upon a rescous of goods distrained for rent arrear (not when fresh pursuit) must be a peaceable re-taking; and the breaking open the gate of the close where the goods are is a trespass.

XII. WHERE NO SUFFICIENT DISTRESS. See also tit. *Ejectment.*

BASTEN *v.* CAREW, H. T. 1825. K. B. 3 *B. & C.* 649; S. C. 5 *D. & R.* 558.

The information under 11 Geo. 2, c. 19, where no sufficient distress, is good, if not appealed against, though not stated to be upon oath.

IN trespass, it appeared that the defendants were justices of the peace, and justified the trespasses under 11 Geo. 2, c. 19, and gave in evidence a record of their proceedings:—that, upon complaint made to them, and at the request of the landlord, they had put the landlord into possession of the premises, which the plaintiff, being his tenant, had deserted. On the part of the defendants it was contended, that this record was conclusive evidence as to the facts mentioned in it, and contained an answer to the action. *Abbott*, C. J., refused to direct a nonsuit; and the case was fully investigated, and the jury found a verdict for the defendants. On motion for a new trial—

Per Cur.—The question in this case is, whether the magistrates have, upon the face of their proceedings, acted within the scope of their jurisdiction; and we are of opinion that they have so done. Now, by 11 Geo. 2, c. 19, s. 16, the magistrates, at the request of the landlord, are required to go and view the premises, and to fix on the most notorious part thereof a notice in writing, stating on what day (at the distance of fourteen days at the least) they will return to take a second view; and then, if the rent in arrear is not paid, or no sufficient distress is found on the premises, they are to put the landlord into possession. There is no mention made in the statute that the proceedings are to be taken on oath.

XIII. OF THE REPLEVY. See also, tit. *Replevin.*

CUCKSON *v.* WINTER, E. T. 1828. K. B. 2 *M. & Ry.* 313.

It is undecided whether the sheriff's precept to replevy can be served by an infant.

A DISTRESS was made by the defendants on the plaintiff's goods on the 24th of May, 1827. It was made on behalf of one Odling, who claimed rent of the plaintiff. The plaintiff wished to replevy, and application was made to the under-sheriff for the usual warrant; but as there was no sheriff's officer at a convenient distance, the warrant was directed to one John Kennington, a clerk of the plaintiff's attorney, whose age did not exceed seventeen years. On the 29th, Kennington took this warrant and shewed it to the defendants; a sale of the goods had been previously announced, and notwithstanding this warrant the sale was commenced and gone on with, until enough was sold to satisfy the distress and expenses; but the goods were not removed away, and they were subsequently re-delivered to the plaintiff. *Alexander*, Chief Baron, was of opinion that what was done subsequently to notice of the warrant of replevy did not amount to a conversion, and he therefore nonsuited the plaintiff. On motion to set aside the nonsuit, it was contended

that an infant is not qualified to execute such a process. The case of *Claridge* v. *Favyn and Another*, (5 B. & Ald. 81), decided that an infant could not be appointed to the office of clerk of a court of requests, where it was part of the duty of that officer to receive the money of the suitors. For the reason given in that case, the person appointed should be a responsible person. It is the business and duty of the bailiff in such a case to take the goods out of the hands of the distrainer, and deliver them over to the party replevying. The infant would be liable to no action for a breach of such a duty; and the distrainers were not bound to let him have goods out of their hands for the delivery of which he would not be responsible; but—

The Court gave no opinion on the point.

XIV. OF AGREEMENTS TO WITHDRAW.

SKEATE *v.* BEALE, E. T. 1840. Q. B. 3 *P. & D.* 597.

An agreement to pay rent in consideration of a distress being withdrawn; plea, that it was void as under duress:—Held, that it did not amount to duress.

IN debt, it appeared that the plaintiff had distrained for 19*l.* 10*s.* due. The defendant signed an agreement, by which, in consideration of the plaintiff withdrawing the distress, he agreed immediately to pay 3*l.* 7*s.* 6*d.* in first payment, and the balance within a month; in default of which, the plaintiff to be at liberty to levy a distress, or take any other steps for the recovery of the same. The defendant being sued on this agreement, sought to avoid it on two grounds: that the distress was wrongfully made for 19*l.* 10*s.*, the smaller sum of 3*l.* 7*s* 6*d.* only being due; and that the defendant entered into the agreement to prevent the sale of his goods, and that there was no consideration for the agreement, except in respect of 3*l.* 7*s.* 6*d.*

The Court held, that neither of those grounds of defence was an answer to the action, and that such an agreement was not void on the ground of duress of goods.

XV. ACTIONS CONNECTED WITH.

(*a*) WHEN MAINTAINABLE, AND FORM OF.

SMITH *v.* GOODWIN, T. T. 1833. K. B. 2 *N. & M.* 114.

Either trespass or case will lie after tender of the rent.

ACTION on the case for an irregular distress. The declaration contained several counts. After verdict, it was moved, in arrest of judgment,—the seventh count discloses that which is matter of trespass, and not of case; it is joined with counts clearly in case; there is therefore a misjoinder, and judgment ought to be arrested. In answer, it was stated that *Branscomb* v. *Bridges*, (1 B. & C. 145; S. C. 2 D. & R. 256), is expressly in point to shew, that where goods are distrained for rent after a tender, the tenant may waive the trespass and maintain case.

The Court were of opinion that the case of *Branscomb* v. *Bridges* was in point, and that the count in question was a mere informal

count in trover, stating the fact of the goods, being the plaintiff's, having come into the possession of the defendants, and being by them converted to their own use.

BAYLIS *v.* FISHER, M. T. 1830. C. P. 7 *Bing.* 153.

It is no answer to an action for an illegal levy, that the plaintiff was not deprived of the use of the goods distrained.

IN an action on the case for an excessive distress, it appeared that the defendant had put a broker in possession, but that still the plaintiff had not been deprived of the control of the property. The jury having returned a verdict for the plaintiff for 15*l.*—

Per Cur.—It seems to us that there was sufficient damage sustained by the plaintiff in this case to justify the finding of the jury. Although the tenant was allowed the free use of the property, yet the having a man in possession was a serious inconvenience and injury. Besides, this case falls within the ordinary rule applicable to cases where the verdict is under 20*l.* We think the rule should be discharged.

(*b*) BY WHOM MAINTAINABLE*.

(*c*) OF THE DECLARATION.

HOLLAND *v.* BIRD, T. T. 1833. C. P. 10 *Bing.* 15; S. C. 3 *M. & Scott*, 363.

In case, for an excessive distress, a count, alleging a taking and wrongful detention, and refusal to re-deliver the goods, &c., is in case, and properly joined.

CASE for an excessive distress. The declaration contained three counts. The first merely alleged the excessive distress, under the statute. The second count, after stating the seizure of the goods, alleged that the plaintiff tendered and offered to the said defendants, in satisfaction and discharge of said arrear of rent and costs and charges, a certain sum of money, to wit, the sum of 6*l.*, the same being then and there a sufficient and proper sum to satisfy and discharge the said amount of rent, together with the costs and charges, &c., and then and there requested the said defendants to re-deliver and restore the said goods and chattels to the said plaintiff; and although the said defendants then and there ought to have accepted and received the said sum of money from the said plaintiff, in discharge of such arrears of rent and costs and charges of the said distress, and to have re-delivered and returned the said goods and chattels to the said plaintiff, nevertheless the said defendants contriving and wrongfully and unjustly intending to harass, oppress, and aggrieve the said plaintiff, did not nor would, when they were so requested as aforesaid, nor at any time since, accept or receive the said sum of money so tendered and offered by the said plaintiff in discharge and satisfaction of the said arrears of rent and the costs and charges, &c., or re-deliver or restore the said goods and chattels, or any part of them, to the said plaintiff, but then and there wholly neglected and refused so to do, and have hitherto wrongfully and injuriously kept and withheld the goods, &c., and converted and disposed of them to their own use &c. The third count imputed to the defendants an improper sale of the goods in question; that they did not sell for the best price, nor leave the surplus of the

* A lodger may maintain an action, if his goods are taken on an excessive distress by the landlord of the party under whom he occupies. (*Fisher* v. *Algar*, T. T. 1826, N. P., 2 C. & P. 374).

money received in the hands of the sheriff or under-sheriff. There was also a count in trover.

The Court held, that the counts might be joined; and that if a landlord, after tender of the rent due, sell the goods distrained for his arrears, case as well as trespass lies by the tenant.

IRELAND *v.* JOHNSON, T. T. 1834. C. P. 1 *Bing. N. C.* 162; S.C. 4 *M. & Scott*, 706.

Misdescription of party to whom rent due is a fatal variance.

IN case for an irregular distress, the second count of the declaration stated that the defendants distrained the goods of the plaintiff on the plaintiff's premises, for and in the name of a distress for arrears of rent due to the defendants, Johnson and Vaughan, upon a demise of the same; and that the defendants, disregarding the statute in that behalf, and contriving to injure the plaintiff, did not cause the goods to be appraised by two sworn appraisers, according to the form of the statute, but before they had been appraised wrongfully sold them. Plea, not guilty.

The Court held, that in a declaration for an irregularity in the conducting of a distress, it is necessary to state with correctness the party to whom the rent is due, and on whose demise the premises distrained upon are held. A variance between the allegation and proof in such respect will be fatal.

(*d*) OF THE PLEAS*. See also ante, p. 458.

WOOTLEY *v.* GREGORY, E. T. 1829. Ex. 2 *Y. & J.* 536.

Under the general issue in trespass, under the 11 Geo. 2, the defendant may shew that a third party distrained;

THE plaintiff, in trespass for seizing and taking goods, appeared to be the assignee of an under-lease granted by G, one of the defendants, and no rent appeared to have been paid. The original lease to G. had also come by assignment to the other defendant, who had obtained a new lease from the lessors, and cancelled the old one.

The Court held, that upon the general issue, under the 11 Geo. 2, c. 19, s. 19, the defendant might justify as for a distress for the rent due in G.'s right, without shewing any express recognition of the act by him; and that the notice having been given in the name of the other defendant did not preclude the defendants from availing themselves of the title under G., in their defence to the action.

WILLIAMS *v.* JONES, E. T. 1841. Q. B. 11 *A. & E.* 643.

and not guilty "by statute," to case for an excessive distress, puts in issue the tenancy, the ownership in the goods, and the matter of justification.

To an action on the case for an excessive distress, the defendant pleaded not guilty. On the question what issue was raised—

The Court held that the plea of not guilty by statute, pleaded under 11 Geo. 2, c. 19, s. 21, in an action for an excessive distress, puts in issue not only the matter of justification, but the tenancy and ownership of the goods.

* Pleas, justifying a taking, as for a distress at different rents, not inconsistent. (*Smith* v. *Dixon*, H. T. 1836, B. C., 4 D. P. C. 571).

POSTMAN *v.* HARRELL, M. T. 1833. N. P. 6 *C. & P.* 225.

But the right to plead the general issue does not extend to fraudulent removals.

IN trespass for taking goods under a distress, it appeared that they had been fraudulently removed and afterwards seized. The defendant pleaded the general issue.

Tindal, C. J.—The fraudulent removal cannot be given in evidence under 11 Geo. 2, c. 19, s. 21. It has been ruled, that the statute does not apply to goods fraudulently removed. It only relates to distresses made upon the premises in respect of which the rent is due.

LADD *v.* THOMAS, M. T. 1840. Q. B. 4 *D. P. C.* 9.

A plea of tender must shew it was made before distress;

ON a plea in trespass for taking goods, justifying the taking as a distress for rent, and impounding them in part of the dwelling-house, new assignment and a tender after the entry and continuance in the premises after the tender. Replication thereto traversing the tender. On motion in arrest of judgment—

The Court held, 1st, that it did not appear that the tender was made before the impounding, and if made after it would be too late; and 2nd, that for the wrongful continuance in possession after the distress made the action of trespass was proper.

WELSH *v.* ROSE, T. T. 1829. C. P. 6 *Bing.* 638; S. C. 4 *M. & P.* 484.

and allege a notice.

IN trespass for distraining goods—plea, alleging the plaintiff to be under-tenant to A. B., the defendant's tenant; and that the defendant had promised, that so long as he paid the rent which should become due to the defendant's tenant, he the defendant would not trouble him or his property; and averring that he had paid the rent up to a certain period, and had tendered the residue, but did not allege that the defendant had any notice of the tender.

The Court held, that it was a mere conditional promise by the defendant, and not having been performed, he was not to be deprived of his remedy by distress, by any proceeding of which he had no notice.

SEALEY *v.* HARRIS, H. T. 1839. Q. B. 7 *D. P. C.* 195.

What is an issuable plea in an action for wrongfully refusing to allow goods to be appraised.

IN an action for wrongfully refusing to permit plaintiff to appraise goods distrained, the defendant being under terms to plead issuably, pleaded that plaintiff was tenant to defendant, and that the goods were taken as a distress for arrears of rent.

Per Cur.—We cannot decide upon this motion, whether or not the plea is good in point of law. It is quite clear that it is bonâ fide pleaded. The principle is the same as that which regulates an action against the sheriff for an escape on mesne process; the party has primâ facie a right to sue, yet if he had no cause of action against the debtor he cannot maintain an action against the sheriff. This is a plea which goes distinctly to the merits.

(*e*) Of the replication and new assignment.

HOOKER *v.* NYE, T. T. 1834. Ex. 1 *C., M. & R.* 258; S. C. 4 *Tyrw.* 776.

De injuriâ cannot be replied in trespass to a plea of distress.

In trespass, the defendant pleaded, that the plaintiff held the premises as tenant to the defendant, and justified under a distress for rent. Replication, de injuriâ.

The Court held, 1st, that the plea was good—the relation of *tenancy*, primâ facie, gives a right to distrain; and 2ndly, that the replication de injuriâ was inadmissible where an interest arising out of land was claimed in the plea, and as matter of substance might be taken advantage of on general demurrer.

NORMAN *v.* WESCOMBE, E. T. 1837. Ex. 2 *M. & W.* 349.

To trespass, plea, that the goods belonged to A. B., and were fraudulently removed to the plaintiff's. New assignment, that it was on a different occasion:—Held, no admission of the plea.

To an action of trespass for breaking and entering the plaintiff's house, the defendant pleaded, that the entry was under a search-warrant for goods clandestinely removed by W. F. to the plaintiff's house to avoid a distress; and new assignment, that it was on another occasion, at a different time, to which the defendant pleaded the tenancy of W. F., at the rent of £—; that one year's rent was due; and that W. F. fraudulently removed the goods as before.

The Court held, that the new assignment was not an admission of the truth of the matter previously pleaded, which was to be taken to relate to another trespass; and that the defendant was bound to prove the demise at the rent stated, and the rent in arrear as alleged in the new assignment.

(*f*) Of the evidence.

TAYLOR *v.* HENNIKER, T. T. 1840. 4 *P. & D.* 242.

Distraining for more than was due may be established, though the things were not sufficient to satisfy the rent really due.

In an action on the case for distraining for more rent than was due, it appeared that the articles seized were sold for a less sum than was sufficient to satisfy the rent actually due. It was contended that the action was not maintainable.

Per Cur.—This is not an action founded upon the stat. 11 Geo. 2, the 19th section of which applies only to cases where the distress is lawful in its inception, but some irregularity is committed which would have rendered the party a trespasser by relation at common law, but by the operation of that statute he is not to be so considered. Here the distress was unlawful in its inception, being for more than was due; the action is at common law; and the selling under the distress is no necessary part of the cause of action, but an aggravation only. The action would have been maintainable before the act of William and Mary, which authorized the sale of goods distrained for rent. The relinquishment of the excessive sum distrained for by notice to the tenant does not cure the wrong, any more than the return of an article converted cures the conversion.

KNIGHT *v.* BENETT, H. T. 1826. C. P. 3 *Bing.* 361.

After payment of rent under a

In replevin, it appeared that the plaintiff and defendant had negotiated for a lease of a farm called Hanbrook Farm; that it was

parol demise, a promise to pay rent half-yearly on fixed days is sufficient to support a distress for a half-year's rent*.

agreed that the lease should be granted for ten years from Michaelmas, 1820, at a certain rent, to be reserved half-yearly and payable at Lady-day and Michaelmas, but that the amount of the rent was not fixed; that the plaintiff took possession in expectation that the lease would be granted, but none was ever drawn up or executed; but it was proved that the plaintiff continued to occupy the farm for three years, and paid rent to Michaelmas, 1822, according to the amount specified in the avowry; and that in April, 1824, he promised to pay the rent due at Lady-day preceding. For the plaintiff, it was objected, that there was no evidence to support the demise as stated in the avowry, as no lease had been executed, and as he only held under an agreement for a lease, and there was no precise rent fixed or reserved, the defendant could not be entitled to distrain. *Graham*, B., however, thought that, as the plaintiff had a present interest in the land, he might be considered as a tenant at will for the first year of his occupying the premises under the terms of the agreement; and that there was sufficient evidence to raise a tenancy from year to year afterwards. The jury accordingly found a verdict for the defendant.

The Court held, that the landlord might distrain, although no lease was drawn up or executed.

(*g*) Of the Witnesses.

WEDGEWOOD *v.* HARTLEY, T. T. 1839. Q. B. 10 *Ad. & E.* 619; S. C. 4 *P. & D.* 84.

The tenancy cannot be proved by the wife of the lessee.

PLEAS in trespass for taking and distraining goods, justifying the entry and seizure: 1st, alleging the plaintiff to be tenant under a demise from the defendant and rent in arrear; and 2nd, alleging the plaintiff's father to be the tenant, and issue thereon denying such tenancy.

The Court held, that, in order to shew that the plaintiff held under her father, the wife of the latter was incompetent to prove the receipt of rent from the plaintiff as tenant to her husband, as the latter would be liable to indemnify the son for a payment he was rendered liable to by the father's default; for there was a direct interest in her in disproving the father's tenancy, which was the fact in issue.

* In an action for an irregular distress, the only evidence at all affecting K., the landlord, was, that all the defendants appeared by the same attorney; and that the defendants' attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K.;" and that the managing clerk of the defendants' attorney, when he served it, had offered 10*l.* to settle the action:—Held, that this was not evidence to go to the jury as against K., and the Judge therefore directed the acquittal of K. (*Crabb* v. *Killick*, H. T. 1834, N. P., 6 C. & P. 216).

In trespass for breaking the plaintiff's house and taking the plaintiff's goods, the defendant pleaded, 1st, not guilty; 2nd, that the goods were not the plaintiff's; and 3rd, as to the breaking, that R. was in arrear for rent to W.; and that R. had fraudulently removed his goods to the plaintiff's house; and that the defendants, as servants of W., distrained the goods. The plaintiff at the trial proved the trespass, and the defendant went into evidence of the fraudulent removal:—Held, that the plaintiff might go into evidence in reply, to shew that W. had parted with his estate before the removal of the goods. (*Ashmore* v. *Hardy*, 1836, N. P., 7 C. & P. 501).

(*h*) Of the damages.

GRACE *v.* MORGAN, H. T. 1836. C. P. 2 *Bing. N. S.* 534; S. C. 2 *Scott*, 790.

THIS was an action on the case for a vexatious and excessive distress, in which a verdict was found for the plaintiff, with liberty to move to increase the damages by the amount of extra costs incurred by the plaintiff in an action of replevin arising out of the same distress, which had been stayed by consent by a Judge's order, and in which the plaintiff had received the taxed costs only.

The plaintiff cannot recover as damages the extra costs occasioned by the replevin.

The Court held, that a plaintiff who had received taxed costs only on staying a replevin suit, could not recover the extra costs as damages in an action for a vexatious and excessive distress.

PROUDLOVE *v.* TWEMLOW, H. T. 1833. Ex. 1 *C. & M.* 326.

ACTION on the case for an irregular distress. The declaration also contained a count in trover. It appeared, that the defendant having seized the goods and growing crops of the plaintiff under a distress for 120*l.*, rent in arrear, sold the crops before they were cut for their full value, and that the crops were afterwards cut and taken away by the purchaser. The whole sum realised under the distress was less than the rent due, and the plaintiff obtained a verdict for special damages on the counts for an irregular distress, and for 97*l.*, the value of the crops, on the count in trover.

If a lessor seizes growing crops, and sells before they are ripe, the tenant is entitled to nominal damages.

The Court held, that the plaintiff was entitled to deduct the amount of rent from the damages; and therefore, if the crops have been sold at their full value, and the amount is less than the rent, the plaintiff can have a verdict for nominal damages only.

(*i*) Of the costs.

GAMBRELL *v.* EARL OF FALMOUTH, 1836. Q. B. 5 *Ad. & E.* 403.

TO a declaration for an excessive distress for rent, the defendant pleaded, that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue. The defendant had a verdict on the question of costs.

If the landlord obtains a verdict, he is still entitled to double costs, though he has pleaded specially*.

The Court held, that a landlord being sued in trespass for an irregular distress, and obtaining judgment against the plaintiff, might recover double costs under stat. 11 Geo. 2, c. 19, though he had pleaded specially.

DUNNAGE *v.* KEMBLE, H. T. 1837. C. P. 5 *D. P. C.* 478; S. C. 3 *Bing. N. S.* 538; S. C. 4 *Scott*, 365.

TRESPASS for breaking and entering the plaintiff's dwelling-house, damaging locks, taking goods, &c. Pleas: first, not guilty; second, except as to breaking open the doors and damaging the locks, that the plaintiff, eighty-four weeks next before the time when &c., held the house as tenant to Kemble at a weekly rent; and the rent for eighty-four weeks being in arrear, the defendants entered, the outer door being open, to distrain and did distrain the goods, &c., for the rent in arrear. In the replication the plaintiff

Pleas, general issue and an entry to distrain; verdict for plaintiff on 1st plea, for defendant on 2nd plea:—Held, that the plaintiff was not en-

* This was before 5 & 6 Vict. c. 97, repealing statutes as to double and treble costs.

titled to costs without a certificate under 22 & 23 Car. 2.

joined issue upon the first plea, and, as to the second, said that the door was not open, and that the defendants of their own wrong, &c. A verdict passed for the defendants on the second plea, and for the plaintiff on the first. Damages one farthing. *Bosanquet*, J., before whom the cause was tried, did not certify under 22 & 23 Car. 2, c. 9, and the prothonotary having refused to tax the plaintiff his costs without such certificate—

Per Cur.—We are of opinion, that the plaintiff was not entitled to costs without a certificate under the stat. of Car. 2, and therefore the rule for directing the prothonotary to tax his costs must be discharged, but without costs.

CHILD *v.* CHAMBERLAIN, E. T. 1834. K. B. 3 *N. & M.* 520; S.C. 6 *C. & P.* 213.

The restriction as to costs of distress in 1 & 2 P. & M. c. 12, does not apply to cases of levying and impounding distress on premises.

THE goods distrained were not impounded off the premises, but were left there in the possession of Jessopp by Bond, one of the defendants. After having been appraised at 17*l.* 12*s.*, and condemned by the three other defendants, they were removed from the plaintiff's premises to an auction-room, where they were sold for 18*l.* 18*s.* On the question, whether the 57 Geo. 3, c. 93, regulating the costs and charges for levying and disposing of a distress for rent under 20*l.* did apply to a case of a distress taken for more than 20*l.*, though made upon goods which are appraised at, and sold for less than 20*l.*—

Per Cur.—At the time of passing the act of 1 & 2 Phil. & Mary, c. 12, distresses could not be impounded on the premises; therefore, the provisions of the second section of that act could apply only to the case of a distress removed from the premises and impounded elsewhere. We think, therefore, that the restriction in the statute of Philip and Mary does not apply to this distress, the more so, as, by the 57 Geo. 3, c. 93, it is provided, that, for a distress for rent under 20*l.*, no more shall be charged than certain sums, much exceeding the sum mentioned in the old statute. This is not a distress for rent under 20*l.*; and it, therefore, does not come within the restriction of that statute.

Distringas.

See tit. *Outlawry*.

I. RELATIVE TO, WHEN GRANTABLE.

(*a*) BEFORE UNIFORMITY OF PROCESS ACT, p. 469.

(*b*) SINCE UNIFORMITY OF PROCESS ACT.

1. *Where Defendant accepts the original Writ*, p. 471.
2. *Where Defendant is in England, and Residence known*, p. 472.
3. *Where Defendant is in England, and Residence unknown*, p. 474.
4. *Where Defendant is abroad*, p. 475.

II. RELATIVE TO, AGAINST WHOM IT LIES, p. 476.

III. RELATIVE TO THE AFFIDAVIT, p. 476.

IV. RELATIVE TO WHEN TO BE MOVED FOR, p. 478.

V. RELATIVE TO THE FORM OF, p. 478.

VI. RELATIVE TO THE INDORSEMENT ON, p. 479.

VII. RELATIVE TO THE LEVY, p. 479.

VIII. RELATIVE TO THE APPEARANCE, p. 479.

IX. RELATIVE TO RULES CONNECTED WITH, p. 481.

X. RELATIVE TO SETTING ASIDE, p. 481.

XI. RELATIVE TO JUDGMENT AFTER, p. 482.

I. RELATIVE TO, WHEN GRANTABLE.

(*a*) Before uniformity of process act.

Kemp *v.* Sumner, T. T. 1828. Ex. 2 *Y. & J.* 405.

Rule to shew cause why the distringas issued in this case should not be set aside for irregularity. Upon an affidavit, which stated that the venire had been served only upon the wife of the defendant at his dwelling-house; that the defendant was abroad upon business, and had not left the country to avoid the process of the Court—

Under the old practice of venire and distringas, the venire need not have been personally served.

Per Cur.—In the cases cited, however, from Bunbury, 67, and Forrest, 29, the service, as in the present instance, was at the dwelling-house only, which species of service was, in a case lately before this Court, upheld. The practice, therefore, favours the regularity of these proceedings, and the rule must be discharged.

Turner *v.* Smith, E. T. 1828. C. P. 1 *M. & P.* 557.

On motion that a writ of distringas might issue to compel the appearance of the defendant in this cause, pursuant to the 5th section of the 7 & 8 Geo. 4, c. 71, which enacts, "That in case it shall

And under the 7 & 8 Geo. 4*, a distringas to

* By 7 & Geo. 4, c. 71, it is enacted, "That in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, or by subpœna and attachment thereupon, in any action at law against any person or persons not having privilege of Parliament, no writ of distringas shall issue for default of appearance, but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service; but in case it shall be made appear to the satisfaction of the court, or, in the vacation, of any judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants, then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the court, or order of such judge, as aforesaid,

compel an appearance granted, if the sheriff said that he believed the party avoided service.

be made appear to the satisfaction of the Court, or, in vacation, of any Judge of the Court from which original process shall issue, or into which the same shall be returnable, that the defendant could not be personally served with the summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant, then it shall be lawful for the plaintiff, by leave of the Court, or order of such Judge, as aforesaid, to sue out a writ of distringas to compel the appearance of such defendant." The affidavit, on which the motion was founded, was made by the sheriff's officer to whom the original process had been delivered, and stated that he had frequently endeavoured to serve the defendant with it personally at his dwelling-house; that he believed that he, the defendant, kept out of the way to avoid being served; and that on one occasion he had seen the defendant's son, and had been told by him that it was useless for him to call again, as his father had left home for the purpose of avoiding the service.

The Court granted the writ.

BENNINGTON *v.* OWEN, M. T. 1831. Ex. 2 *C. & J.* 125.

And after four unsuccessful attempts to serve process, and statement

THE affidavit stated four attempts to serve the defendant personally at his dwelling-house. On the three first occasions the deponent saw a servant maid of the defendant, who told him, on the first occasion, that her master was not at home; and on the

to sue out a writ of distringas to compel the appearance of such defendant or defendants; and at the time of the execution of such writ of distringas there shall be served on the defendant or defendants by the officer executing such writ, if he, she, or they can be met with, and if he, she, or they cannot then be met with, there shall be left at his, her, or their dwelling-house, or other place where such distringas shall be executed, a written notice; and if such defendant or defendants shall appear at the return of such original or other writ, or of such distringas, as the case may be, or within eight days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper court of the personal service of such summons or attachment, and notice written on the foot thereof as aforesaid, or of the due execution of such distringas, and of the service of such notice as is hereby directed on the execution of such distringas, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon as if such defendant or defendants had entered his, her, or their appearance, any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the court out of or into which such writ shall issue or be returnable, authorized to take affidavits in such court, or else before the proper officer for entering common appearances in such court, or his lawful deputy, and which affidavit is hereby directed to be filed *gratis*."

Before the 7 & 8 Geo. 4, c. 71, s. 5, the distringas could not issue until four days after the return of the venire, and the act was not obligatory upon the Court, and they might delay issuing it for a reasonable time. Allowed to issue on the eighth day after the return. (*Thomas* v. *Elder*, Ex., 1 Cr. & J. 517; and 1 Tyrw. 496; S. P. *Field* v. *Radden*, Id. 518; and see *Dobell* v. *King*, 1 Tyrw. 498, notes).

The process being founded on a contempt of Court in not appearing, the Court required the summons to be returned, and where it had not been personally served, that it should be shewn that the party kept out of the way to avoid the service; leaving the process at a country house of the defendant, he being a foreigner, and having no residence:—Held not sufficient. (*Hall* v. *Gumple*, Ex., 1 Cr. & J. 539; and 1 Tyrw. 490). The Court at one time doubted, whether the proceeding by distringas was not taken awayby 51 Geo. 3, c. 124, and 7 & 8 Geo. 4, c. 71, refused to increase issues. (*Pennell* v. *Kingston*, Ex., 1 Cr. & J. 548; and 1 Tyrw. 495).

Since the 7 & 8 Geo. 4, c. 71, the Court will not increase issues on a distringas at common law. (*Watson* v. *Locke*, Ex., 2 Cr. & J. 203; and 2 Tyrw. 212; and see *Pennell* v. *Kingston*, 1 C. & J. 548).

second and third occasions, that her master had not been at home since the deponent last called. The same answer was received from the defendant's daughter on the fourth occasion (the return day); and subsequently the defendant's son informed the plaintiff's attorney that the defendant kept out of the way to avoid being arrested.

by defendant's son that the defendant kept out of way to avoid arrest, distringas granted.

The Court held, that the affidavit laid a sufficient ground for the distringas.

FISHER *v.* GOODWIN, M. T. 1831. Ex. 2 *C. & J.* 94; S. C. 2 *Tyrw.* 164.

ON motion for leave to issue a distringas, on an affidavit stating that the defendant had been sued in several actions, and that the defendant's servant had told the deponent, who went twice to his house to serve the venire, that it was of no use attempting to serve him.

Three attempts were required to serve the venire before a distringas would be granted.

Bayley, B.—The Court consider it almost always requisite, although there may be an exception to the rule, that a third attempt should be made to serve the venire.—Rule refused.

(*b*) SINCE THE UNIFORMITY OF PROCESS ACT*.

1. *Where Defendant accepts the Original Writ.*

ATKINSON *v.* HOWELL, M. T. 1840. Ex. 8 *D. P. C.* 872; S. C. 7 *M. & W.* 213.

THE plaintiff having, at the defendant's request, sent him by post a copy of a writ of summons, the receipt of which was not acknowledged until nearly a month afterwards; on motion for leave

If the defendant has retained the original

* By 2 Will. 4, c. 39, s. 3, it is enacted, "That in case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or in vacation of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such distringas shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff, or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or vacation; and if such writ of distringas shall be returned non est inventus and nulla bona, and the party suing out such writ shall not intend to proceed for outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit, to the satisfaction of the court out of which such writ of distringas issued, or in vacation of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution."

writ, the distringas cannot be obtained.

to enter an appearance for the defendant, without indorsing on the back of the writ the day of the week and month of the service, pursuant to the Reg. Gen. Michaelmas Term, 3 Will. 4—

Per Cur.—The plaintiff has fallen into his present difficulty by departing from the usual course. No doubt the defendant, as a man of honour, ought to appear; but as he refuses to do so, the plaintiff must go on, and in the ordinary way.

---

2. *Where the Defendant is in England, and Residence known.*

WADDINGTON *v.* PALMER, E. T. 1833. Ex. 2 *D. P. C.* 7.

No distringas will be granted if defendant be in the country;

SIX attempts had been made during six weeks to serve the defendant, by calling at the house where he lived. The answer was, that he was out of town.

Per Cur.—That will not do; from first to last he is said to be in the country.

PRICE *v.* BOWER, E. T. 1833. B. C. 2 *D. P. C.* 1.

he should be shewn to be in the neighbourhood*.

THE affidavit for a distringas stated that the answer was that he was not at home, and that it was not known when he would be.

Bayley, B.—That is not enough; it must be shewn, from the answers given or otherwise, that the defendant is at home, or in the neighbourhood, during the time you go.

ARCHER *v.* BRINDLEY, M. T. 1840. C. P. 9 *D. P. C.* 38.

Keeping out of the way to avoid process sufficient to ground a distringas.

ON motion for a distringas, the Court allowed the distringas to issue, although the probability was, that the defendant had never heard of the applications and calls made, it being sworn and believed that he was keeping out of the way to avoid execution in another suit.

MASON *v.* LEE, T. T. 1835. K. B. 5 *N. & M.* 240.

There must be three calls† to serve, and the copy left at the third visit;

A CLERK to the plaintiff's attorney had called three times at the defendant's residence, but had been unable to see him. On the occasion of the second visit, a copy of the writ was left with the defendant's servant; and at the third visit the copy left on the preceding occasion was referred to.

Per Cur.—We have considered of this matter, and we think that there ought not to be any rule. The copy should be left at the third visit.

* To ground the distringas, it must appear that the defendant was at home, or in the neighbourhood, when the calls were made. (*Williams* v. *Hosier*, 1 T. & G. 805).

† But, in another case, after three calls and two appointments, although the copy of the process was left at the second instead of the last call, the defendant keeping out of the way to avoid service, a distringas allowed. (*Webb* v. *Jenkins*, M. T. 1838, C. P., 7 D. P. C. 135). A declaration by the defendant, that he will keep out of the way to avoid being served, does not waive the necessity of complying with the practice of making three calls, &c., in order to obtain a distringas. (*Clayton* v. *Marsham*, E. T. 1837, B. C., 5 D. P. C. 542).

HILL *v.* MAULE, E. T. 1833. Ex. 1 *C. & M.* 617; S. C. 2 *D. P. C.* 10.

ON motion for a distringas, it appeared that a copy of the writ of summons had been left at the defendant's dwelling-house at the second time of calling. The Court said, that the copy ought to be left at the last time of calling, as that was the day from which the time for entering an appearance was to be reckoned; but they stated that as it was desirable that there should be a uniformity of decision upon the point, they would consult the other Judges. On a subsequent day—

Lord *Lyndhurst*, C. B., said.—We have conferred with the Judges of the other courts, and all the other Judges are of opinion that the copy must be left at the last time of calling.

in which view all the judges concurred.

WHITE *v.* WESTERN, H. T. 1834. B. C. 2 *D. P. C.* 451.

IT was clear from the affidavit that the defendant was keeping out of the way to avoid service of the process; and the only peculiarity in the case was, that the two latter calls had been made on the same day.

Parke, J.—That is of no consequence. It is only necessary to shew that when the calls are made the defendant is keeping out of the way.

Parke, J., held that the two last calls may be made on same day;

CROSS *v.* WILKINS, M. T. 1835. B. C. 4 *D. P. C.* 279.

THE affidavit on which the motion was made stated three calls and two appointments. The two last calls had been made, and the copy left at the third call. All the three calls, however, had been made in one day. *White* v. *Western*, (2 D. P. C. 451, supra), was relied on, where it was held, that two attempts to serve a summons in order to obtain a distringas may be made on the same day, if it appears that the defendant is purposely keeping out of the way.

But *Littledale*, J., said, I cannot concur in the decision of Mr. Justice *Parke*, so that, if only two of the calls in the present case had been made in one day, I should not have granted the writ. I think that all the calls ought to be made on separate days.—Rule refused.

but *Littledale*, J., ruled, that all the calls must be made on different days.

SMITH *v.* GOOD, M. T. 1833. B. C. 2 *D. P. C.* 398.

ON motion for distringas, it appeared that no specific appointment was made for the last call, although there had been three calls, and times named for the two first calls—

Littledale, J., held, that the service was bad, as a time should have been specified for the third call.

The time must be specified for each call;

NEWMAN *v.* HICKMAN, E. T. 1841. B. C. 9 *D. P. C.* 546.—S. P. ATKINSON *v.* CLEAN, M. T. 1836. B. C. 5 *D. P. C.* 252.

THE affidavit for a distringas stated, the two last calls were made pursuant to appointments, but no hour was mentioned at which the deponent would call. *Johnson* v. *Disney*, (2 D. P. C. 400), was cited, where it was held, that the hour of the appointment should

the hour as well as the day;

be mentioned, unless the facts of the case shewed that the defendant was endeavouring to avoid being served.

Wightman, J.—The hour not being appointed, it seems to me, rendered it no appointment at all. The practice has always been to name the hour. This case is different from that of *Johnson* v. *Disney*, (2 D. P. C. 400).

SMITH *v.* GOOD, M. T. 1833. B. C. 2 *D. P. C.* 398.

but the several calls need not be made by the same person.

THE plaintiff's attorney called and saw the defendant's shopman, whom he fully acquainted with the object of his call, and was informed that his master was from home. The attorney appointed next day at eleven o'clock for a second call, and went accordingly at that time; he again saw the shopman, who stated that his employer was out of town. He then left a copy of the writ with the shopman. The third call was made by the attorney's clerk.

Per Littledale, J.—I think it makes no difference whether the three calls are made by the same person or by different persons, so long as all the other requisites to good service are complied with.

MOODY *v.* MORGAN, M. T. 1838. C. P. 7 *D. P. C.* 144; S. C. 6 *Scott*, 842.—S. P. HICKMAN *v.* DALLIMORE, M. T. 1835. B. C. 4 *D. P. C.* 278.

Special circumstances will induce Court to grant distringas without the formality of three calls and appointments,

THE defendant had been residing in furnished lodgings, and it was not known where he now lived. A copy of the writ had been sent by post to his attorney, and it was believed that it must have reached the defendant's hands as he had since written to the father of the plaintiff, telling him that his son had commenced an action for a bill for boots and shoes, which amounted to 7*l.* and upwards. The defendant's attorney had also, by letter, offered four guineas to settle the action, alleging that there was an overcharge in the account.

The Court granted a rule.

JOHNSON *v.* DISNEY, M. T. 1833. B. C. 2 *D. P. C.* 400.

especially if shewn to have knowledge of the calls.

THE affidavit stated, that the deponent, on the 28th of October, called a third time, and saw the servant, who said, first, that her mistress was out of town, but, on deponent's saying that legal proceedings would be taken, went up stairs, and, on coming down again, said her mistress would call on plaintiff, and pay the bill.

Per Littledale, J.—It does not appear that the three usual calls were made in this case, but sufficient has been stated to render it evident that there was an endeavour on the part of the defendant to be always out of the way. She must, therefore, be presumed to be cognizant of the calls.—Distringas granted.

---

3. *Where Defendant is in England and Residence unknown*.*

ESDAILE *v.* MARSHALL, H. T. 1838. C. P. 4 *Bing. N. S.* 172; S. C. 6 *D. P. C.* 400.

Service at the supposed place

IN this case the plaintiff had obtained leave from a Judge at chambers to issue a distringas on an affidavit of an attempt to serve

* Where the residence of the defendant is unknown, endeavours must be made to serve the defendant personally before the distringas can be obtained. What

the defendant with the writ of summons at "Ebford cottage, in the parish of Woodbury, in the county of Devon," and, upon a return of nulla bona and non est inventus, had entered an appearance, and afterwards signed judgment for want of a plea.

of residence is of no avail.

Tindal, C. J.—As it appears to me, the affidavit on which the distringas issued, and upon which the plaintiff was afterwards allowed to enter an appearance, is framed in such a manner that the writ itself may be said to have issued with the sufficient and usual authority, inasmuch as such affidavit does not contain the ordinary and usual allegation of making appointments, I am not prepared to say, that, on the present occasion, the plaintiff is shewn to have any knowledge of the defendant's being abroad at the time. I, therefore, cannot say it has issued irregularly; but, under the circumstances, I think the defendant ought to be let in to defend this action, the only terms imposed on him being, that he enter a common appearance. Proceedings of this description must, as it is evident to all, be narrowly watched.—Rule accordingly.

---

4. *Where Defendant is abroad, or in Ireland.*

GROVER *v.* HINDMARSH, E. T. 1839. B. C. 7 *D. P. C.* 607.

If a party be abroad, and nothing to shew he is absent to avoid creditors, a distringas will not be granted*.

THE affidavit on which plaintiff moved stated, that, on the first occasion, when inquiry was made at the house of the defendant, the answer given was, that he had gone abroad to Boulogne; at the two subsequent calls a similar answer was given.

Williams, J.—The first account given is, that he was abroad, and so is the last. There is no reason to think he has absconded in order to avoid the process of this Court.

EVANS *v.* FRY, E. T. 1835. B. C. 3 *D. P. C.* 581.

So, if a defendant be in Ireland with his regiment, no distringas lies.

THE affidavit merely stated that the defendant was with his regiment in Ireland, and fruitless efforts made at his residence in London, and not that he had quitted the country to avoid his creditors, nor that he would not in due time return to this country.

The Court held it insufficient to found the distringas.

will be considered as sufficient endeavours to entitle a plaintiff to his distringas in such cases has not been decided by the courts. (*Anon.*, 1 D. P. C. 155).

Service of the writ of summons, by leaving it at the house of the defendant's uncle:—Held insufficient, as, if he kept out of the way to avoid service, the plaintiff should proceed by distringas in the usual way. (*Sainsbury* v. *Thorp*, 9 D. P. C. 183).

Under special circumstances, the Court will allow a writ of distringas to compel an appearance to be issued against a defendant, although his residence cannot be discovered, the usual service of the writ of summons by calls and appointments having been effected at his two last known places of abode, and on an agent for the receipt of his rents, who stated himself to be in communication with his principal. (*Grindley* v. *Thom*, E. T. 1837, B. C., 5 D. P. C. 544).

* A statement by a clerk that his master is abroad, and he does not know when he will return, is not sufficient to found a distringas. (*Taylor* v. *Bush*, T. T. 1840, B. C., 8 D. P. C. 613). And if the defendant is abroad, the proceedings will be set aside as irregular. (*Partridge* v. *Walbank*, M. T. 1837, Ex., 2 M. & W. 893). Where the defendant was abroad at the time when the writ was sued out, having gone to avoid his creditors, but his servants remained in his house, the Court, upon the usual affidavit, allowed the distringas. (*Moon* v. *Thynne*, M. T. 1834, 3 D. P. C. 153).

II. RELATIVE TO, AGAINST WHOM IT LIES.

RAWSON *v.* MOSS, E. T. 1840. Ex. 8 *D. P. C.* 412.—S. P. JONES *v.* EVANS, E. T. 1840. B. C. 8 *D. P. C.* 425; S. C. 6 *M. & W.* 420.

If the defendant be in a lunatic asylum, and cannot be seen, the distringas may be served on the keeper*.

ON motion for a distringas, it appeared that the defendant was insane, and in a lunatic asylum. Application had been made to the keeper, who had refused to allow the defendant to be seen.

Per Cur.—A rule may be taken, and served upon the keeper.

III. RELATIVE TO THE AFFIDAVIT FOR.

WAITE *v.* COOK, M. T. 1840. B. C. 9 *D. P. C.* 139.

To ground a distringas there must be an affidavit by the party shewing the attempts to serve†;

A WRIT of summons had been issued against the defendant, and he not appearing, a writ of distringas was sued out and lodged with the sheriff. To this writ the sheriff returned non est inventus and nulla bona.

Patteson, J.—That is not sufficient. There must be an affidavit of the sheriff's officer to shew what attempts have been made to execute the writ.—Rule refused.

See Daniels v. *Varity, ante,* 3 *D. P. C.* 26; 1 *Chit. Arch. Prac., p.* 131, *7th ed.*

WILLS *v.* BOWMAN, M. T. 1833. B. C. 2 *D. P. C.* 413.

and must state the day and hour of calling,

THE affidavit stated three calls had been made. On the first the deponent saw the wife, on the second and third calls he saw the defendant's servant.

Littledale, J.—That will not do. He ought to have mentioned the day and hour on which he would call again, and then perhaps he might have seen the defendant.

BOWSER *v.* AUSTEN, M. T. 1831. Ex. 2 *C. & J.* 45; S. C. 2 *Tyrw.* 164.

and the residence of the defendant;

THE affidavit did not state where the defendant resided when attempts were made to serve the venire. It was contended that this was unnecessary; and the Court, on being referred to the report of *Pitt* v. *Eldred*, (1 Cromp. & J. 147), which represents the

* Service of the summons on a peer at his house, when he is absent abroad, is sufficient to ground a distringas. (*Anon.*, T. T. 1831, B. C., 1 D. P. C. 81).

† The affidavit must state a belief that the defendant is not out of the country. (*Norman* v. *Winter*, H. T. 1839, C. P., 4 Bing. N. S. 637; S. C. 6 Scott, 378; S. C. 7 D. P. C. 304; abridged, post, tit. *Outlawry*).

The affidavit for a distringas is sufficient if it appears from the facts stated that the party is keeping out of the way to avoid service, without an express allegation of the deponent's belief as to that. (*Channing* v. *Cross*, M. T. 1840, B. C., 9 D. P. C. 118).

To obtain the distringas for not appearing, it must be shewn, that the defendant was absent, or circumstances stated from which it must be inferred that he is keeping out of the way to avoid the process. (*Houghton* v. *Howorth*, 4 D. P. C. 749).

point to have been then decided, stated, that the point was not adverted to in Mr. Tyrwhitt's reports, (1 Tyrw. 128). But—

The Court, on reference to the Master, considered the statement of the requisites of the affidavit for a distringas in Messrs. Crompton and Jervis's Reports accurate, and that the residence must be shewn.

COPELAND *v.* NEVILL, T. T. 1835. K. B. 5 *N. & M.* 172; S. C. 4 *D. P. C.* 51.

THE affidavit stated, that the sheriff's officer received a warrant and a copy of a writ of distringas, returnable on the 1st of June, to compel an appearance; that the sheriff's officer went to the house of the defendant, situate &c., where he was informed by a man servant on the premises that the defendant and his family had recently left the house, and that there were no effects or property belonging to the defendant on the premises; that he made diligent inquiries to find out the defendant to serve him with a copy of the writ of distringas, but was unable either to find him or to discover his place of abode, or any goods and chattels belonging to him upon which he could distrain in pursuance of the writ, which was returned by the sheriff, nulla bona—non est inventus. The attorney's clerk, also, by affidavit, made a statement of his belief, that the defendant had absconded and kept out of the way to avoid all proceedings at law.

and specify the place and persons of whom inquiries were made;

Per Cur.—It does not sufficiently appear to the satisfaction of the Court, that every reasonable inquiry has been made to discover where the defendant's present place of abode is. True, it is stated, that the sheriff's officer had made diligent inquiries; but it should have appeared what the nature of those inquiries were, and of whom they were made, that the Court might be satisfied that all due and diligent inquiries had been made.

SAUNDERSON *v.* BOURNE, H. T. 1834. Ex. 2 *D. P. C.* 338.

THE defendant was a clerk in the victualling department. It was sworn that the plaintiff had been unable to discover any residence or property of the defendant, and that due diligence had been used to execute a distringas. No notice had been left at the Admiralty for him.

as they must appear to be proper inquiries;

Bayley, B.—You might have inquired at the Admiralty, and have left a notice for him. The act says, it must be made out to the satisfaction of a Judge.

SCARBOROUGH *v.* EVANS, E. T. 1833. Ex. 2 *D. P. C.* 29.—S. P. SAMPSON *v.* LORD GROVES, E. T. 1833. Ex. Id. 10.—S. P. BALGUY *v.* GARDNER, E. T. 1833. Ex. Id. 52.

THE affidavit stated, that three attempts had been made to execute the distringas at the defendant's present or late place of abode.

and be fully stated.

Per Cur.—You do not negative a knowledge of any other place of abode, nor do you state that you cannot find him. You ought to state the grounds fully for believing that he cannot be found.

Statement, that defendant is out of town, must be shewn to be false before distringas granted.

SMITH *v.* HILL, M. T. 1833. Ex. 2 *D. P. C.* 225.

THE affidavit stated, that the answers given were, that the defendant was out of town.

Bayley, B.—When the answer given is, that the defendant is out of town, inquiries ought to be made in the neighbourhood to learn whether any person has seen him about.

IV. RELATIVE TO WHEN TO BE MOVED FOR.

ABBOTTS *v.* KELLY, H. T. 1837. C. P. 5 *D. P. C.* 478; S. C. 3 *Bing. N. S.* 478; S. C. 4 *Scott*, 256.—S. P. LEMON *v.* LEMON, 1835. C. P. 2 *Scott*, 500.

A distringas cannot issue after the return of the summons*.

A RULE, calling on the plaintiff to shew cause why a writ of distringas issued in this case should not be set aside, on the ground of the four months allowed by the 10th section of 2 Will. 4, c. 39, for the duration of the writ of summons having expired before the writ of distringas had issued. *Lemon* v. *Lemon*, (2 Scott, 506), was cited and relied on, where it was held, that a distringas to compel an appearance could not issue after the expiration of the writ of summons.

Tindal, C. J.—I think the rule should not be made absolute. The difficulty in refusing the application is this: the writ of distringas is sued out to enable the plaintiff to enter an appearance for the defendant, or to outlaw him; and how can a man be called upon to appear to a writ which is exhausted and gone by?

V. RELATIVE TO THE FORM OF†.

VERE *v.* GOWAR, H. T. 1837. C. P. 5 *D. P. C.* 494; S. C. 3 *Bing. N. S.* 503; S. C. 4 *Scott*, 287.

If a distringas be described as to compel an appearance, it cannot be made process of outlawry.

ON motion for setting aside proceedings to outlawry, the objection was, that the distringas on which they were founded had been originally sued out for the purpose of compelling an appearance.

Per Cur.—We think, that, according to the form of the distringas given in the schedule of the Uniformity of Process Act, the

* Where the time for appearance to a writ of summons is out on Friday, a motion to issue a distringas may be made on Monday on an affidavit sworn on Saturday, stating, that on that day no appearance had been entered by the defendant. (*Spence* v. *Barker*, H. T. 1840, B. C., 8 D. P. C. 296).

But, in the cases of *Bromage* v. *Ray*, E. T. 1841, Q. B., 9 D. P. C. 559; *Pearce* v. *Swain*, E. T. 1841, Ex., 9 D. P. C. 724; S. C., 7 M. & W. 543, it was decided, that a distringas may issue after the expiration of four months from the issuing of the writ of summons.

† Where a writ of summons, and the copy left at the defendant's abode in order to obtain a distringas, described the defendant's Christian name by the initial only, he having so signed the bill of exchange on which the action was brought, the Court required an affidavit that he had so signed the bill before the writ of distringas was allowed to issue. (*Wooley* v. *Cunningham*, M. T. 1839, B. C., 8 D. P. C. 139).

plaintiff must take his election as to whether he intends to proceed to outlawry or merely to compel an appearance at the time he issues the writ of distringas.

VI. RELATIVE TO THE INDORSEMENT ON WRIT*.

VII. RELATIVE TO THE LEVY.

JONES *v.* DYER, H. T. 1834. B. C. 2 *D. P. C.* 445.

If sheriff only levy 2*s.* 6*d.* under distringas for 40*s.*, appearance ordered.

ON motion for an appearance to be entered, it appeared, that when the sheriff proceeded to levy under the writ he only found 2*s.* 6*d.* worth of property on the premises. This amount he had taken. It was necessary that this fact should be mentioned to the Court, as the writ of distringas in the notice attached to it mentioned the sum of 40*s.* as having been levied by the sheriff.

Per Patteson, J.—An appearance may be entered for the defendant.

VIII. RELATIVE TO THE APPEARANCE.

WARREN *v.* LOVE, E. T. 1839. B. C. 7 *D. P. C.* 602.

An appearance not in conformity with the rule, is no appearance†.

THE form in which the defendant had entered the appearance upon the book was:—

" In Q. B.
Thomas Warren, Plaintiff, } Attorney for
against
George Love, Defendant. } Appears for

It was contended, that it ought to appear whether the appearance was in person or by attorney. The form here adopted, however, was imperfect either as an appearance in person or by attorney.

* On this writ must (by the 12th section of the 2 Will. 4, c. 39) be indorsed the name and place of abode of the attorney actually suing out the distringas; and in case such attorney shall not be an attorney of the Court out of which the same shall be sued, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a memorandum, expressing that the same has been sued out by the plaintiff in person; mentioning the city, town, or parish, and also the name of the hamlet, street, or number of the house of such plaintiff's residence, if any such there be; and also the amount of debt and costs, pursuant to the third rule of H. T., 2 Will. 4, thus: " The plaintiff claims £— for debt, and £— for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

† If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the Court as soon as such steps are taken by the former as shew his intention to proceed on the appearance. (*Strange* v. *Freeman*, H. T. 1836, B. C., 5 D. P. C. 407). The sheriff's returns of non est inventus and nulla bona are not alone sufficient to entitle the plaintiff to enter an appearance, but the efforts to execute the distringas must be shewn, and that not merely by hearsay

Per Cur.—The first to be pursued is, where a party appears in person, and the second, where he appears by attorney. In the latter case the name of the attorney is to be given, and he is to be declared as the person who so appears for the defendant. In the other case the party is stated to appear in person. The statute describes that to be the form of entry. It is, therefore, no entry at all. The appearance, consequently, entered by the plaintiff was regular.

PAGE *v.* HEMP, T. T. 1835. Ex. 2 *C., M. & R.* 494; S. C. 4 *D. P. C.* 203.—S. P. TUCKER *v.* BRAND, M. T. 1835. B. C. 4 *D. P. C.* 411.

After levy on a distringas, plaintiff entitled to enter an appearance without affidavit of the execution of the writ.

IN this case a writ of distringas had issued against the defendant, and the sheriff returned that he had levied 40*s.*; but his bailiff refused to make an affidavit of the service of the copy of the writ and the notice. The plaintiff had applied to enter an appearance for the defendant; but the officers at the Rule Office refused to allow him without such an affidavit.

Parke, B.—The objection is, that it does not appear that the notice required by the act to be appended to the writ of distringas was shewn to the defendant. On inquiry, however, we find that it is not necessary to have the affidavit; therefore, an appearance may be entered.—Rule granted.

JOHNSON *v.* SMEALEY, H. T. 1833. B. C. 1 *D. P. C.* 526.

Upon a distringas for an appearance, if there be a levy plaintiff may appear without leave; if non est returned, leave must be obtained;

ON motion to enter an appearance for the defendant under the 2 & 3 Will. 4, c. 39, s. 3. A distringas had been issued, and a levy made under it. The question was, whether, under these circumstances, the plaintiff could enter an appearance for the defendant without the leave of the Court.

Parke, J.—If the party's goods are not distrained, and the sheriff returns non est inventus and nulla bona, it is necessary, according to the act, that the leave of the Court should be obtained before the plaintiff enters an appearance for the defendant; but where the goods of the defendant are distrained, then, according to the form attached to sect. 3, the plaintiff may enter an appearance for the defendant, without the leave of the Court.

evidence. (*Daniels* v. *Varity*, M. T. 1834, B. C., 3 D. P. C. 26). But on the sheriff's return of non est inventus and nulla bona to a writ of distringas, if it appears that the defendant keeps out of the way to avoid his creditors, the Court will allow an appearance to be entered for him, but will not, on the same motion, give leave to stick up notice of declaration in the office. (*Copeland* v. *Neville*, T. T. 1835, B. C., 4 D. P. C. 51). Where, after a rule for a distringas has been obtained, and before the issue of the writ, the defendant admits that he has been served with the summons, an appearance may be entered for him by the plaintiff. (*Saunders* v. *De Chartelin*, T. T. 1836, B. C., 5 D. P. C. 154). And where the time for entering an appearance had expired:—Held no objection that the affidavit of no appearance was not made until four days after the search made. (*Waugh* v. *Pry*, E. T. 1839, Ex., 7 D. P. C. 376). A plaintiff has four terms from the service of a writ of summons within which to enter an appearance for the defendant, if the latter does not appear. (*Liddel* v. *Cranch*, T. T., 1837, B. C., 5 D. P. C. 662). Where a defendant, by fastening up his house, prevents the sheriff from executing a writ of distringas, the Court will allow the plaintiff to enter an appearance for him, although the defendant is known to be within the house. (*Whishaw* v. *Brown*, M. T. 1840, B. C., 9 D. P. C. 123).

CORNISH *v.* KING, E. T. 1833. Ex. 3 *Tyr.* 575; S. C. 2 *D. P. C.* 18.

and if the latter, it must be shewn that fruitless inquiry of his goods elsewhere had been made.

ON motion to enter an appearance, the affidavit of the officer to whom the sheriff's warrant on the distringas was given, stated that he had attended several times at the defendant's residence, and each time left a copy of the distringas, but the answer was that the defendant was not within; and he was further told that there was nothing there of the defendant's to take, as the lodgings were let to him ready furnished. The affidavit stated that nulla bona and non est inventus had been returned.

Bayley, B.—The affidavit must be amended, by adding that the defendant has no effects elsewhere that can be taken; then a rule may be granted.

IX. RELATIVE TO RULES CONNECTED WITH*.

X. RELATIVE TO SETTING ASIDE†.

SWIFT *v.* WRIGHT, M. T. 1839. Ex. 7 *D. P. C.* 863; S. C. 5 *M. & W.* 618.

A variance between the summons and distringas is a mere irregularity.

IN the writ of summons, the defendant was described as "C. K.;" in the distringas, and also in the plaintiff's affidavits; in shewing cause against a rule to set aside the distringas, he was described as "C. J. J. K.," sued as "C. K." The distringas was returned on the 4th of November, and this motion not being made until the 13th—

Per Cur.—This is the case of an irregularity, and not a nullity; and as the application is made too late, the rule must be discharged with costs.—Discharged with costs.

* Where on account of the defendant's residence being unknown, the Court gives leave to serve him in a particular manner, they will not make a prospective rule that service of future rules, &c., may be effected in the same way. (*Martin* v. *Colvill*, T. T. 1834, Ex., 2 D. P. C. 694). Where a party moves to discharge a rule obtained for a distringas to compel appearance, he should bring before the Court the affidavits upon which that rule was granted. (*Cooper* v. *Folkes*, M. T. 1840, C. P., 9 D. P. C. 46). An appearance was entered for the defendant; and after notice of declaration and demand of plea, he took out a summons for time to plead, which was not returnable until after the time for pleading expired. The plaintiff signed judgment:—Held, that a rule to plead was necessary, though an appearance had been entered for the defendant, but that the objection was waived by the summons for time. (*Bolton* v. *Manning*, T. T. 1837, Ex., 5 D. P. C. 769; abr. post, tit. *Plea*).

† An affidavit by a defendant in support of an application to set aside an appearance irregularly entered by a plaintiff, after notice that the service of the process was abandoned, need not deny "that any other process had come to defendant's knowledge," if it denies the service of any subsequent writ. (*Wintle* v. *Hogg*, E. T. 1339, B. C., 7 D. P. C. 623).

If a defendant seeks to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. (*Johnson* v. *Smallwood*, T. T. 1834, B. C., 2 D. P. C. 588).

On motion to set aside the distringas, the only question is, whether there appears enough on the face of the plaintiff's affidavit to have justified the issuing it; the Court cannot enter into the inquiry as to whether the defendant has sustained no substantial injury. (*White* v. *Johnson*, M. T. 1835, Ex., 5 Tyrw. 1033).

PYBUS *v.* BRYANT, E. T. 1834. Ex. 4 *Tyrw.* 994; S. C. 2 *D. P. C.* 640.

So, if the summons and distringas state the Christian name correctly, and the copy does not mislead, no ground for setting aside.

ON motion to set aside a distringas and proceedings thereon, it appeared that the writ of summons and distringas stated the defendant's name correctly, and the copy of the writ could not mislead.

The Court held, that the service of such copy was sufficient for the purpose of obtaining the distringas: and that a variance, the writ being in "an action on promises," and the distringas "in a plea of trespass on the case on promises," was immaterial.

HITCHCOCK *v.* BADHAM, M. T. 1831. Ex. 2 *C. & J.* 129; S. C. 2 *Tyrw.* 159.

But if goods be sold to wife during defendant's absence abroad, and a venire left at the dwelling-house of the wife, and a levy made on the goods there, the Court will set aside the proceedings.

THIS action was brought for a sum due for millinery goods supplied to the defendant's wife, who carried on the business of a milliner, in March, 1830. In September of that year, the defendant went to Hobart's Town, in Van Diemen's Land, and, during his absence, a levy of 40*s.* was made by the plaintiff, under a distringas issued as at common law, on millinery goods, at the residence of the wife in this country.

Per Cur.—The action is brought against the husband, and by suing him the goods in the trade are admitted to be his, and he is made liable. He is absent from the country, and can know nothing of the process, consequently his goods cannot be taken to compel an appearance.

GALE *v.* WINKES, M. T. 1836. C. P. 5 *D. P. C.* 348; S. C. 3 *Bing. N. S.* 295; S. C. 3 *Scott*, 667.

To set aside a distringas it is not too late at any time before the return of the writ.

THIS was an action of debt, in which, on the 27th of October, *Parke*, J., at chambers, had ordered a distringas to issue upon an affidavit which stated, that, on the 13th of October, a call was made at the house of the defendant, who was not found at home. The party calling left a letter for the defendant with the female servant, in which he stated the object of his coming, and that he would call again on the ensuing Saturday at a quarter before nine in the evening for the purpose of giving him a copy of the summons. He did call accordingly, and was informed by the servant, that the letter was delivered as addressed to the defendant, but that he was not then at home. Upon this the copy of the writ of summons was left.

The Court held, that an application to set aside a writ of distringas, and return the money levied, by reason of the omission to indorse the amount of the debt, is not too late if made before the writ is returnable.

XI. RELATIVE TO JUDGMENT AFTER*.

* Where the defendant had not appeared to a writ of summons, and after a distringas and appearance judgment signed for want of a plea, notice of inquiry allowed by sticking up in the office, and a copy left at the last place of residence. (*Watson* v. *Delcroix*, M. T. 1834, Ex., 2 D. P. C. 396; S. C. 2 C. & M. 425).

Distribution, Statute of. See 8 *Peters. Ab.* 447. *Mascall on the Statute of Distributions.*

Disturbance. See tits. *Common—Decoy—Riot—Way.*

Divorce. See tit. *Husband and Wife; and* 8 *Peters. Ab.* 459.

Docket-Roll. See tit. *Roll.*

Docketing-Issues. See tit. *Isssue.*

Dogs. See tits. *Animals—Game.*

Donatio Causa Mortis*.

Donative. See tit. *Advowsons.*

* A donatio mortis causâ must be free from the donor's control, (*Hawkins* v. *Blewitt*, T. T. 1817, K. B., N. P., 2 Esp. 663), and cannot be constituted by a mere parol gift without delivery, (*Iron* v. *Smallpiece*, E. T. 1817, K. B., 2 B. & Ad. 551), which delivery must be actual, and not symbolical; consequently, if a donor direct a person to deliver certain things to the donee after his death, and in the mean time to deposit them in a chest of which the donor keeps the key, the donee is not entitled to the gift; (*Bunn* v. *Markham*, T. T. 1816, C. P., Holt, N. P. 352; S. C. 7 Taunt. 225; S. C. 2 Marsh. 532); and whether, if the donor say to the donee, "Fetch it away, I will make you a present of it," passes a donatio causâ mortis, is unsettled. (*Speatley* v. *Wilson*, T. T. 1815, C. P., Holt, 10). But delivery of a mortgage security held to be a good donatio causâ mortis, and the heir or executor bound to give effect to it. (*Duffield* v. *Hicks*, 1 Dow, N. T. (P.) 1; and 1 Bli. N. S. 497).

Where the obligee, a few days before her death, indorsed an assignment of the bond, without consideration, and not under seal, and delivered it to the assignee:—Held not to operate as a donatio causâ mortis, nor a good gift inter vivos; and that the Court could not carry it into effect as an imperfect gift. (*Edwards* v. *Jones*, 1 Myl. & Cr. (Ch.) 226).

The mere delivery of a mortgage-deed cannot pass the property inter vivos; and the Court could not compel the donor to complete his gift by executing a deed:—Held, therefore, that the gift not being completed, there was no valid donatio causâ mortis of the mortgage, even where accompanied with the gift of the bond; in the latter instance the mortgagor might resist the payment of the bond without a conveyance of the estate, which the donor could not be compelled to execute. (*Duffield* v. *Elwes*, 1 Sim. & St. (Ch.) 243).

Double Insurance. See tit. *Insurance.*

Double Pleas. See tit. *Pleas.*

Double Rent* and Value†.

BOOTH *v.* MACFARLANE, H. T. 1831. K. B. 1 *B. & Ad.* 904.

Double rent only attaches whilst the tenant is in possession, and he is not bound to give a notice to quit.

IN an action for double rent, it appeared that, in 1824, the defendants were tenants to the plaintiff of a warehouse and premises at the rent of 65*l.* per annum. The defendants gave notice on the 16th of December, 1824, of their intention to quit at Midsummer, 1825. The notice was served on a Mr. Charles Wood, who had been appointed by the Court of Exchequer receiver of the rents and profits of the premises. In consequence of such notice, Wood entered into a negotiation with one Watts for the demise of the premises, which negotiation was afterwards broken off. In October, 1825, Watts, with the defendant Barbour, called on the plaintiff, and Watts said he had agreed with the defendants that they should continue in possession. The defendants continued to hold over after the expiration of their notice to quit, and no demand of possession was made on the part of the plaintiff. An action was commenced against the defendants in February, 1826, by the plaintiff for half a year's double rent, due at Christmas, 1825, by virtue of the stat. 11 Geo. 2, c. 19, s. 18. The defendants settled this action by paying 65*l.* for the half-year's double rent, and 8*l.* 3*s.* 6*d.* for costs, on the 11th of March, 1826. They still held possession, and on the

* By 11 Geo. 2, c. 19, s. 18, it is enacted, "That, in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises, and shall not accordingly deliver up the possession thereof at the time in such notice contained, the said tenant or tenants, his, her, or their executors, or administrators, shall from thenceforth pay to the landlord double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered, in the same manner as single rent." By the effect of which provision landlords are now, in all such cases, entitled to make distress for the double rent so incurred. (See 1 Blac. 533; Brad. Dist. 104).

† By the 4 Geo. 2, c. 28, s. 1, it is enacted, "That, if any tenant or tenants for life or lives, or years, or persons coming in under or by collusion with them, hold over any lands, tenements, &c., after the determination of their estates, after demand made and notice in writing given for delivering the possession thereof by the landlord or the persons having the reversion or remainder therein, or his agent thereunto lawfully authorized, such person or persons so holding over shall pay to the person so kept out of possession at the rate of double the yearly value of the lands, tenements, &c. so detained, for so long a time as the same are detained, to be recovered by action of debt, whereunto the defendant afterwards shall be obliged to give special bail."

The chief difference between the statutes is, that by the 4 Geo. 2, the notice, (which must be in writing), proceeds from the landlord; and by the 11 Geo. 2, it is the act of the tenant, (where the notice may be by parol). And the former imposes double value by way of penalty and not as rent; and the latter still treats the party as tenant and recognises him by that name, which the other statute does not.

23rd of June, 1826, paid 65*l.* for another half-year's double rent, due the next day, and at the same time tendered the keys of the premises. Wood refused to accept the keys, and he insisted on a notice to quit it at the end of another year's occupation at double rent, and the defendants had never since been in the occupation of the premises, nor had any steps been taken by the plaintiff indicating his intention to resume the possession of them. The question for the opinion of the Court was, whether the plaintiff was entitled to recover any thing in consequence of the defendants' not having given a fresh notice to quit.

Per Cur.—We think the words of the statute limiting the landlord's right are very clear:—"Such double rent shall continue to be paid during all the time such tenant shall continue in possession as aforesaid." Here the tenant paid the double rent all the time he continued in possession, and he is not bound to pay it after he has quitted. We cannot understand the word, "possession," in any sense but that which denotes possession in fact.

HIRST *v.* HORN, E. T. 1839. Ex. 6 *M. & W.* 393.

A notice to quit on a certain day, "or at such time as the holding shall expire," is sufficient.

IN an action for double value, it appeared, that a notice to quit lands had been given for a certain day, "or at such time as your holding shall expire next after the expiration of a half-year from the receipt of this notice."

The Court held, that the notice amounted to a demand of possession within the stat. 4 Geo. 2, c. 28, s. 1; thereby rendering the tenant liable for double value for holding over after the expiration of the notice to quit.

POOLE *v.* WARREN, M. T. 1837. Q. B. 3 *N. & P.* 693.

An authority to a receiver as such, and to bring ejectments &c., authorizes him to sue for double value*.

IN an action for double value, it appeared, that a joint authority given by mortgagors and mortgagee of premises to a person to be the receiver, agent, and attorney of the mortgagors; to receive the rents until satisfaction of the mortgage, to bring actions in the case of non-payment of rent, to give notice to quit, to bring ejectment in case of non-compliance, as fully as the mortgagors might have done.

The Court held it a sufficient authority for him to demand possession of tenants under 4 Geo. 2, c. 28, s. 1, so as to make them liable in double value for holding over.

JOHNSTONE *v.* HUDLESTONE, M. T. 1825. K. B. 4 *B. & C.* 922; S. C. 6 *D. & R.* 392.

To enable a party to distrain for double value a regular notice to quit must have been given.

IN replevin, it appeared, that the terms of the holding were from the 26th of March for one year fully, &c., and so on from year to year, so long as both the plaintiff and defendant should respectively please; and after occupying the premises for above a year, the plaintiff, on the 19th December, gave defendant parol notice of his intention to quit on the then next March 25th, to

* But, a landlord is not entitled to distrain for double rent, under the statute, for holding over after notice to quit upon a weekly tenancy. (Per *Best*, C. J., on the authority of *Lloyd* v. *Rosbie*, 2 Camp. 453; *Sullivan* v. *Bishop*, 1826, N. P., 2 C. & P., 359).

which the defendant assented, but the plaintiff afterwards refused to deliver up the possession, and defendant afterwards distrained for double rent.

The Court held, that the interest of the tenant not having been put an end to by a valid notice, (being less than half a year), and no act done by the landlord to shew that he considered the term at an end, nor any assent in writing to operate as a surrender by the Statute of Frauds, or in any way binding on himself and the tenant, he could not maintain an ejectment, nor distrain for double rent, under the 11 Geo. 2, c. 19, s. 18; nor was he under such avowry entitled to recover the single rent, it being no part of the rent claimed by him under the statute.

JONES *v.* WILLIAMS, H. T. 1839. Ex. 4 *M. & W.* 375; S. C. 7 *D. P. C.* 207.

In an action for double value, the plea nil debet puts all the facts in issue.

DEBT, by landlord on 11 Geo. 2, c. 19. s. 3, for assisting the tenant in fraudulently removing his goods to prevent a distress for rent. Plea, not guilty. It was contended on behalf of the plaintiff, that, as this was a case arising upon a statute subsequent to 21 Jac. 1, c. 4, the plea was not one given by section 4 of that act, and did not put in issue the allegation in the declaration, that, "on &c., certain goods and chattels, to wit, &c. of the tenant were upon the said messuage and premises." *Vaughan*, J., however held otherwise, and the defendant had a verdict.

Lord *Abinger*, C. B., stated, that the Barons concurred in opinion, that the plea of the general issue was given by the statute of James, and that the 4th section applied to cases arising upon subsequent statutes, as was in fact held in *Spencer* v. *Swannell*, (3 M. & W. 154). The new rules consequently have operation upon the plea.—Rule refused.

Dower*.

MOODY *v.* KING, H. T. 1825. C. P. 2 *Bing.* 447; S. C. 10 *Moore*, 233.

Under a devise to A. B., and if

ON a devise to W. F. and his heirs for ever, charged with an annuity to testator's wife, and, if W. F. should have no child or issue,

* The 3 & 4 Will. 4, c. 105, has introduced a variety of alterations as to the law connected with dower. By s. 1, it is enacted, "That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act, except where the nature of the provision, or the context of the act, shall exclude such construction, be interpreted as follows; that is to say, the word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing."

By s. 2, it is enacted, "That where a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land."

the lands to become the property of the heir-at-law, subject to such legacies as W. F. might leave by will to any of the younger branches of the family: in a case sent by the Vice-Chancellor—

The Court held, that the widow of W. F. was entitled to dower out of the devised premises; with a cesset executio during the existing terms to which they were subject.

no issue, then to the heir-at-law:—Held, that A. B.'s wife was entitled to dower.

RIDDELL *v.* JENNER, T. T. 1833. C. P. 10 *Bing.* 29.

THE 9th section of the 1 Car. 1, "An Act for the settling &c., of the Copyhold Estates and Customs of the Tenants in base Tenure of the Manor of Cheltenham," enacts, that "the wives of the copyholders which shall join in any grant or surrender with their husbands of any of the customary messuages or lands, being first solely

By custom, widow may be entitled to dower of copyholds of which her husband was

By s. 3, it is enacted, "That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced."

By s. 4, it is enacted, "That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will."

By s. 5, it is enacted, "That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."

By s. 6, it is enacted, "That a widow shall not be entitled to dower out of any land of her husband, where, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land."

By s. 7, it is enacted, "That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land."

By s. 8, it is enacted, "That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid."

By s. 9, it is enacted, "That where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."

By s. 10, it is enacted, "That no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will."

By s. 11, it is provided always "That nothing in this act contained shall prevent any courts of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them."

By s. 12, it is enacted, "That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies."

By s. 13, it is enacted, "That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris."

By s. 14, it is enacted, "That this act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st of January, 1834; and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st of January, 1834, the effect of defeating or prejudicing any right to dower."

tenant during the coverture, but did not die seised*.

and secretly examined in court, according to the custom there, shall be concluded and barred afterwards to claim any right, title, or estate whatsoever, of or in those lands so surrendered as aforesaid."

The Court held that the plaintiff, widow of a copyholder, was entitled to dower out of customary lands of which her husband was tenant during the coverture, but of which he did not die tenant; such lands having been aliened during the coverture by the husband alone, without the wife having been solely and separately examined in court, or having joined in the surrender thereof.

HETHERINGTON *v.* GRAHAM, T. T. 1829. C. P. 6 *Bing.* 139; S. C. 3 *M. & P.* 399.

Adultery amounts to a forfeiture of dower.

THIS was a writ of dower unde nihil habet. The tenant pleaded, in bar to the count, that the demandant, in the lifetime of her late husband, and during her coverture with him, voluntarily and of her own accord, left her husband; and from thence, until the time of his death, voluntarily and of her own accord, lived away from him; and during her coverture with her said husband, continually until the death of one William Coulson, of her own accord, and without the license or consent and against the will of her husband, lived away from her said husband in adultery with the said William Coulson; and that the husband was not, at any time after the demandant left his house, or after she lived in adultery with the said William Coulson, voluntarily or in any manner reconciled to her. Replication.—That though true it was that the demandant voluntarily and of her own accord left her husband, yet that she left him with his consent for that purpose granted, and separated and parted from her husband; and that such separation continued, with their mutual consent, until the husband's death; and that, if any act of adultery took place, the same took place after such separation and parting from her husband, and during the period of such separation by their mutual consent.

Per Cur.—The question raised upon the pleadings for the judgment of the Court is this: whether, under the statute 13 Edw. 1, c. 34, commonly called the Statute of Westminster the second, the commiting an act of adultery, and continuing with the adulterer, is any bar to the wife's right to dower, where she has previously left her husband with his consent, and is living apart from him with such consent at the time of the adultery; or whether it is necessary, in order to satisfy the words of the statute, that the original leaving of her husband should be a leaving with the adulterer by his means or persuasion. That the adultery of the wife was no bar to her dower at common law is expressly laid down by Lord Coke in his

* By the custom of the manor of Cheltenham, as settled by 1 Car. 1, the widow of a copyholder is entitled to dower out of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been examined in court, or having joined in the surrender. (*Doe* d. *Riddell* v. *Gwinnell*, 1 Gale & D. 180). Where such lands, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower according to their value at the time of his death, although one-third remain not built upon; and if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each of such possessors. (*Ib.*).

reading on this statute in the second Institute; indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the courts of law took no cognizance. As well, however, for the purpose of preventing that offence, as more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family, it is enacted by the 34th chapter of the statute, "that if a wife willingly leave her husband, and go away and continue with the advowterer, she shall be barred for ever of an action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon," except in an event which has not happened in this case, and to which it is therefore unnecessary to advert. It is somewhat singular that throughout the whole of this long statute, consisting of 50 chapters, this is the only one in the old law French, the whole of the others being in Latin; and even this chapter changes from the law French to the Latin just at the place where the subject begins. The chapter, however, after making a distinction between the carrying away women without force and with force, and enacting a punishment for those offences, provides for the case now in question, viz. that of the woman leaving her husband willingly, and continuing with the adulterer, in the words above cited.

GAUNT *v.* WAINMAN, H. T. 1836. C. P. 3 *Bing. N. S.* 69; S. C. 3 *Scott*, 413.

THE tenant in a writ of dower took the lands conveyed by the assignees of a bankrupt, and which in the deed were described as freehold.

The land being described in the writ as a freehold, may still be shewn to be leasehold.

The Court held, that he was not estopped from proving them to be leasehold only.

DOE *v.* NUTT, 1826. N. P. 2 *C. & P.* 430.

AN action of ejectment was brought by the lessor of the plaintiff, who was the widow of a person who had been seised in fee of the premises in question—

Before assignment, ejectment does not lie for dower.

Garrow, B.—I am clearly of opinion that an ejectment does not lie for dower before it is assigned.—Nonsuit.

SLATTER *v.* SLATTER, M. T. 1834. C. P. 1 *Bing. N. S.* 259; S. C. 1 *Scott*, 82.

THE demandant, in January, 1833, sued out her writ of dower unde nihil habet. In the ensuing May the tenant, amongst other things, pleaded that demandant had, by a certain deed of separation between herself, her husband, in his lifetime, and certain trustees, waived her dower, and accepted an annuity in satisfaction. In August, 1833, an order was made by the Court of Exchequer, in which the demandant had filed a bill against the father of her husband, as his administrator, by consent of the litigating parties, that the trustees named in the deed of separation should pay her the arrears of the annuity settled upon her by such deed, without prejudice to her other claims, which they accordingly did, and she received the same on the 9th of September.

In dower, a plea of accord and satisfaction of an annuity is not proved by a receipt of dividends subsequently to the plea.

The Court held that such receipt by her, at such an interval of time after action brought and plea pleaded, was not sufficient evi-

dence to support the issue raised, of her election to receive such annuity in satisfaction of dower:—Held, also, that the order of the Court of Exchequer of August, 1833, was admissible in evidence, not as an adjudication, but as a circumstance to shew the animus with which the demandant received the sums in question.

JONES *v.* JONES, T. T. 1832. Ex. 2 *C. & J.* 601; S. C. 2 *Tyrw.* 531.

In a claim of dower, if the jury do not find that the husband died seised, the widow will not be entitled to costs.

IN dower unde nihil habet, a plea, that before the commencement of the suit the tenant was ready and willing and tendered, and still is ready and willing to render dower. On a question as to costs—

Per Cur.—The plea does not deprive the widow of her right to damages and costs under the Statute of Merton, as such plea should have contained an averment that the tenant had always been ready and willing to render dower from the death of her husband. But there is another objection, that it is not alleged that the husband died seised. We are not able to get over the difficulty the Statute of Merton presents. The words of the statute are: "Whoever deforceth widows of their dowers of the lands whereof their husbands died seised, and that the same widows after shall recover by plea, they that be convict of such wrongful deforcement shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging from the time of the death of their husbands unto the days that the said widows, by judgment of the court, have recovered their seisin thereof; and the deforcers, nevertheless, shall be amerced at the King's pleasure." Now, at the common law the widow was entitled to no damages. This statute in terms gives them only in those instances where the husband dies seised; and when we come to see what was the language of the earliest treatises of those lawyers who wrote nearest to the statutes, we find it laid down in the books that those were the instances to which damages were confined. In Coke Littleton, 32. b., it is laid down, that "she shall recover damages only where her husband dies seised, that is to say, of the freehold and inheritance; for albeit the husband, before the title of dower, had made a lease for years, reserving a rent, the wife shall recover the third part of the reversion, with a third part of the rent and damages; for the words of the statute are, 'de quibus viri sui obierunt seisiti.'"

Drainage.

See also 3 *&* 4 *Vict. c.* 55.

SYSON *v.* JOHNSON, M. T. 1828. K. B. 8 *B. & C.* 795.

Omissions in a subsequent drainage act may be supplied by a prior statute.

UNDER an original local drainage act the adventurers were expressly liable to cleanse and purge the river G.; and by a subsequent act, reciting that the landowners, commoners, adventurers, &c., were desirous of obtaining a better drainage, and had agreed to erect, maintain, &c., certain works, in the proportions afterwards mentioned, a clause enacted, that the costs of executing all the said works were to be paid by the persons liable to the repairs of

the banks, in conjunction with the owners, &c., interested, in such proportions as the commissioners should by their award appoint; but that the banks, after being so completed, were to be repaired, from time to time, as the commissioners should in like manner appoint.

The Court held, that the latter act providing only for the expense of repairing the banks, but not for the expense of cleansing the river, and not exonerating the adventurers from their original liability, they continued liable to that burthen.

Dramatic Performance. See tit. *Theatre.*

Driving.

I. ACTION FOR NEGLIGENT DRIVING, WHEN MAINTAINABLE, p. 491.

II. BY AND AGAINST WHOM MAINTAINABLE, p. 492.

III. OF THE FORM OF ACTION, p. 494.

IV. OF THE PLEAS, p. 495.

V. OF THE EVIDENCE, p. 496.

VI. OF THE WITNESSES, p. 497.

VII. OF THE DAMAGES, p. 497.

I. ACTION FOR NEGLIGENT DRIVING, WHEN MAINTAINABLE *.

PLUCKWELL *v.* WILSON, T. T. 1832. N. P. 5 *C. & P.* 375.

Although a party in driving is not

IN an action on the case for negligent driving there was contradictory evidence as to the cause of the injury, and also as to whether

* Where the party injured, though on the right side of the road, by turning aside might have escaped the injury, yet if it appears that he was met on a sudden, so as not to have time or self-possession in what way to decide, the wrongdoer is answerable for the mischief which ensues. (*Chaplin* v. *Hawes*, M. T. 1828, N. P., 3 C. & P. 554).

The master is liable for an injury committed by his servant in negligent driving whilst in charge of the carriage entrusted to him by his master, although driving it improperly in a different direction: semb. aliter, if the servant takes out the carriage for a purpose of his own, and without the authority of the master. (*Heath* v. *Wilson*, 1827, N. P., 2 M. & Rob. 181).

Where the injury was occasioned by the negligence of a party to whom the defendant's servant had entrusted the reins, the servant being at the time in the carriage :—Held, that it was the same as if the servant had himself been driving, and the defendant liable. (*Booth* v. *Mister*, T. T. 1835, N. P., 7. C. & P. 66).

In case, for injury by the negligent driving of the defendant's servant :—Held,

bound to use his own side of the road, still he must adopt more care if he does not pursue that course.

the defendant's carriage was in the centre, or on its proper side of the road.

Alderson, J., said, that a person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better look out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.

TURLEY *v.* THOMAS, 1837. N. P. 8 *C. & P.* 303.

The rule as to keeping on the sides of the road applies to horses as well as carriages*.

IN case for negligent driving, it appeared that the plaintiff's servant was driving the gig on the proper side of the road, and that the defendant then was on horseback, riding at a great rate in the opposite direction, and was on his wrong side of the way when he came into collision with the plaintiff's gig, and broke it.

Per Coleridge, J.—The rule of the road as to keeping the proper side applies to saddle-horses as well as carriages; and if a carriage and a horse are to pass, the carriage must keep its proper side, and so must the horse.

II. BY AND AGAINST WHOM MAINTAINABLE.

WHEATLEY *v.* PATRICK, T. T. 1837. Ex. 2 *M. & W.* 650.

A party who permits another to drive, by whose mismanagement an injury is occasioned, is liable.

IN an action on the case the declaration stated, that the plaintiff was possessed of a horse, at that time drawing in an omnibus, and that the defendant was possessed of a chaise and a horse then harnessed to and drawing the chaise, and which chaise and horse were under the care, management, government, and direction of the defendant, who was driving the same; yet that the defendant so negligently and improperly drove and directed his chaise and horse, that by the negligence and improper conduct of the defendant the chaise ran and struck against the plaintiff's horse, and killed it. Plea, not guilty. It appeared in evidence, that the defendant borrowed the horse and gig of a Mr. Delafosse, and that a Mr. Nicholls accompanied the defendant in it on an excursion into the country, and that when the accident happened to the plaintiff's horse Mr. Nicholls was driving. The Lord Chief Baron on these facts directed the jury to find a verdict for the plaintiff. On motion to set it aside—

Per Cur.—It seems to us, that this is not to be decided by the test, whether the defendant would have a remedy over against Nicholls or not. If an action had been brought by Delafosse against

that the plaintiff could not recover where it appeared that the action was partly occasioned by the plaintiff's own want of care and negligence. (*Woolf* v. *Beard*, T. T. 1838, N. P., 8 C. & P. 373).

* A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. (*Boss* v. *Litton*, M. T. 1832, N. P., 5 C. & P. 407).

In an action on the case for an injury occasioned by the negligence of the defendant's servant in driving:—Held, that, if the injury were attributable in any degree to the incautious conduct of the plaintiff herself in crossing the road, the defendant would not be liable. (*Hawkins* v. *Cooper*, H. T. 1838, N. P., 8 C. & P 473).

the defendant for any accident to the chaise or horse, he would have been liable. The chaise and horse were lent to the defendant, and he is answerable in this action for permitting Nicholls to drive.

LAUGHER *v.* POINTER, T. T. 1825. K. B. 5 *B. & C.* 547; S. C. 8 *D. & R.* 556.

AN action on the case for an injury received by a horse of the plaintiff in consequence of the careless and negligent driving of the defendant's coachman; it appeared that the defendant, a country gentleman, had hired a pair of horses and a coachman, from a livery-stable-keeper, to take his own carriage into the city. The defendant's counsel on this contended, that there was not such a relationship of master and servant as would render the defendant liable for the acts of the driver. The Lord Chief Justice admitted the force of the objection, and directed a nonsuit, with leave to move for a new trial. On motion for a new trial—

The Court were divided on the question, whether the owner of a carriage who hires a pair of horses for the day is liable for the negligence of the driver sent with the horses*.

The Lord Chief Justice and Mr. Justice *Littledale* concurred in thinking that the action was not maintainable; and that there was no essential distinction between the defendant's situation and that of a person who hired a hackney-coach, post-chaise, or a wherry. In none of these cases would the fare either in reason or by law be answerable for any damage resulting from the misfeasance or negligence of the conductors of the vehicle. Neither was it consistent with common sense, or any legal principle, that the defendant should be liable in the manner here contended for. Mr. Justice *Bayley* and Mr. Justice *Holroyd* were of opinion that the action was maintainable; that the driver of the defendant's carriage being employed for his convenience, and under his direction, for the time being, must on that account be considered as a servant, and if so, that the question came within the principle of decided cases. No judgment entered on the postea.

SMITH *v.* LAWRENCE, E. T. 1828. K. B. 2 *M. & Ry.* 1.

THIS was an action on the case for an injury done to the plaintiff's horse and gig by the defendant's servants, who, by negligent driving, caused a carriage and the horses drawing it, upon which they rode, to strike against the plaintiff's horse and gig. The declaration contained but one count. The defendant was accustomed to let out horses and to supply the postilions. A person named Charlton wished for four horses to draw his carriage to Ascot races and back. The defendant accordingly supplied the horses and the postilions; and it was through the negligence of the latter that the injury to the plaintiff had been caused.

In a subsequent case it was held, that the stable-keeper, and not the hirer of horses for the day, is liable for an injury committed by the former's servant.

Lord *Tenterden.*—Consistently with the opinion I delivered in *Laugher* v. *Pointer*, supra, I am of opinion that the defendant in this case is liable. Two of my learned brothers, who then differed

* In an action for damages done through negligent driving of a carriage and horses let to hire and driven by the servants of the owner, it is a question for the jury whether the servants were acting as the servants of the person hiring, or of the owner. (*Brady* v. *Giles*, T. T. 1835, N. P., 1 M. & Rob. 494; questioning (*Laugher* v. *Pointer*, 5 B. & C. 547).

from me, think that case is distinguishable, that the owner of the carriage would not here be liable, and consequently that the present defendant is.

Mr. Justice *Bayley*.—I am of opinion, that this case is distinguishable from that of *Laugher* v. *Pointer*. The horses were never out of the possession of the defendant. The servants were never the servants of Charlton; Charlton had merely engaged that the defendant should supply him with horses and servants to take him in his carriage to Ascot and back. And *Holroyd* and *Littledale*, Js., concurred.

GOODMAN *v.* KENNELL, H. T. 1828. C. P. 1 *M. & P.* 241; S. C. 3 *C. & P.* 167.

A servant sent on an errand took a horse out of his master's stable and run over the plaintiff. The jury found for the plaintiff, and the Court refused to interfere*.

IN an action against the defendant for the negligence of his servant, in riding over the plaintiff, it appeared that the man was only occasionally employed by another person who kept a horse in a stable, which was jointly occupied by him and the defendant; that on the occasion in question, the man having been sent to town by the defendant, took that horse, and rode over the plaintiff. It was left to the jury, at the trial, to say whether or not the horse was used with the consent, either express or implied, of the defendant; and the jury having returned a verdict for the plaintiff—

By the Court—The fact of a servant's riding the horse of another person without the knowledge or consent of his master, would unquestionably not render the latter liable for any act of misconduct in his servant. Here, however, the evidence was contradictory, that the question of credibility was for the jury to consider. Cucking, it appeared, was employed by the defendant; the horse was in a stable that might be called the defendant's stable; and Cucking, when he rode over the plaintiff, was about the defendant's business, The circumstances raised an almost irresistible presumption tha. the servant's taking the horse was not unsanctioned by his emt ployer. The jury drew that inference. The case was properly left to them, and we cannot disturb their verdict.

III. OF THE FORM OF ACTION.

WILLIAMS *v.* HOLLAND, T. T. 1833. C. P. 10 *Bing.* 112.

If the wrong so committed in driving be immediate, case will lie, unless the act was wilful.

IN an action on the case, the declaration alleged that the plaintiff was lawfully possessed of a certain cart, &c. and of a certain horse, &c. then and there drawing the same, in which the son and servant, and infant daughter of the plaintiff, were riding, in and along a certain common and public highway; that the said defendant was then and there possessed of a certain other carriage, (to wit, a gig), and of a certain other horse, drawing the same, and which said carriage and horse were then and there under the care, government, and direction of the said defendant, &c.; nevertheless, the said defendant, then and there, carelessly, unskilfully, and improperly drove, governed, and directed the said carriage and horse, so that by and through

* Husband may recover in an action on the case for careless driving against his chaise, as well for injury done to his wife as to the carriage, although she be not joined in the action. (*Alison* v. *Foster*, M. T. 1823, N. P., 1 C. & P. 21).

the carelessness, negligence, unskilfulness, and improper conduct of the said defendant, the said carriage and horse of the said defendant then and there ran and struck, and came with great violence upon and against the said cart and horse of the said plaintiff, and thereby then and there crushed, broke to pieces and damaged the same, and the said cart of the said plaintiff was rendered of little or no use to the plaintiff; and thereby the son and daughter of the said plaintiff were cast and thrown out with great force and violence from the said cart, by which the plaintiff lost the service of the said &c., to the plaintiff's damage, &c. The defendant pleaded the general issue—not guilty. Upon the trial, it was objected, that the form of the action was misconceived: that it should be trespass, not case.

Per Cur.—An action on the case lies against the defendant, though the injury with which he is charged be immediate, and the act by which such injury is caused be violent, provided the injury and the act, of which it is the effect, be attributed to negligence and want of skill, and be not wilful.

MORETON *v.* HARDEN, T. T. 1825. K. B. 4 *B. & C.* 223.

And, if one of several stage-coach proprietors commits an injury in driving, trespass lies against him, or case against him and his co-proprietors.

IN an action on the case against three defendants, proprietors of a stage-coach, the declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving.

Per Cur.—The real ground of action is the negligence of Harden. It is brought against all the proprietors. They are all responsible for the person appointed to drive, whether the person be or be not one of themselves. They are answerable as the owners of the coach and horses. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could only be an action on the case, for they are not by his act made co-trespassers. If case lies against *them*, it lies against him also as a joint proprietor.

IV. OF THE PLEAS.*

EMERY *v.* CLARKE, 1837. N. P. 2 *M. & Rob.* 260.

Not guilty admits the ownership of the carriage, and the party by whom driven;

IN an action on the case for injury by negligent driving, the Judge who tried the cause was of opinion that the ownership of the carriage, and the fact of its being driven by the defendant's servant, as alleged in the inducement, was admitted by the plea, not guilty.

See Taverner v. *Little*, 5 *Bing. N. S.* 678; *post, p.* 496.

* In trespass for driving against plaintiff's horse:—Held, that, under the plea of not guilty, it might be shewn that, instead of the defendant driving against the plaintiff, the plaintiff drove against the defendant, and which was for the jury to decide. (*Pearcy* v. *Walter*, H. T. 1834, N. P., 6 C. & P. 232).

So, in trespass, for injury done to a horse by a pony and chaise running against it, it was sworn on the part of the defendant, that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:—Held, that, if true, this was a good defence, under plea of not guilty. (*Goodman* v. *Taylor*, M. T. 1832, N. P., 5 C. & P. 410).

TAVERNER *v.* LITTLE, M. T. 1839. C. P. 5 *Bing. N. S.* 678; S. C. 7 *Scott*, 796.

that plea only denying the wrongful act.

IN case for damage, by the negligent driving a cart by the plaintiff. The Court held, that under the plea "not guilty," under the rule of H. T., 4 Will. 4, the defendant could not shew that the cart was not at the time driven by him, nor in his possession, those being facts stated in the inducement, of which the plea could not operate as a denial, and the misconduct in driving being the only wrongful act put in issue thereby.

GOUGH *v.* BRYAN, T. T. 1837. Ex. 2 *M. & W.* 770; S. C. 5 *D. P. C.* 765.

But in case, a plea that the defendant's servant was not to blame, but it was the plaintiff's fault, is bad on demurrer.

IN an action on the case, for an injury by the defendant's coach driving against the plaintiff's carriage, the defendant pleaded that the plaintiff's carriage was driven by one of his sons, and in so unskilful a manner that the collision happened thereby, and not through any negligence of the defendant's servant.

On demurrer—The Court held the plea bad, as amounting to the general issue; and said the new rules of pleading have not abolished the plea of the general issue, but only circumscribed the species of evidence which may be established under it.

V. OF THE EVIDENCE.*

BARFORD *v.* NELSON, H. T. 1831. K. B. 1 *B. & Ad.* 571.

The name painted on a coach is good evidence of the party being a proprietor.

THIS was an action on the case, for damage occasioned by negligent driving of the defendant's stage-coach. The plaintiff proposed to shew the defendant to be the owner of the coach in question, by evidence of her name being on the coach door. *Park*, J., was of opinion that this was not sufficient; and he thereupon nonsuited the plaintiff. On motion to set the nonsuit aside, the 9 Geo. 4, c. 49, s. 16, and 50 Geo. 3, c. 48, s. 7, were referred to.

Lord *Tenterden*.—There is nothing to limit the provision or proceedings to penalties. The clause expressly, and in general terms, declares it shall be evidence that the person whose name is on the coach is the owner or proprietor.

BRIGGS *v.* AYNSWORTH, 1836. N. P. 2 *M. & Rob.* 168.

If the defence be an *alibi* the plaintiff may produce evidence to contradict it.

IN an action on the case for injury by negligent driving at L., the defence (as to the identity of the defendant) set up an *alibi*, viz. at R.; the Judge held, that being a question on a new fact disclosed in the defence, the plaintiff was entitled to call evidence in contradiction of such new fact, although the general nature of the defence had been disclosed by the cross-examination.

* Where, upon the accident occurring, some persons in the defendant's carriage gave the address, and said, "that any damage would be paid for:"—Held, that the address given, but not any other statement, was admissible. In such case, a plan, shewing not merely the streets, but supposed position of the carriages, was rejected as *too* leading a representation of the fact in dispute. (*Beamon* v. *Ellice*, E. T. 1831, N. P., 4 C. & P. 585).

VI. OF THE WITNESSES.

YEOMANS *v.* LEIGH, E. T. 1837. Ex. 2 *M. & W.* 419.—S. P. PICKLES *v.* HOLLINGS, 1835. N. P. 1 *M. & Rob.* 468.

In an action for negligent driving by the defendant's servant, the servant is a competent witness under 3 & 4 Will. 4*.

CASE for negligent driving by the defendant's servant: plea, not guilty. The servant was tendered as a witness on the part of the defendant. *Bolland*, B., however, considering him incompetent without a release, he was not examined, and the plaintiff had a verdict. On motion for a new trial, it was contended, that the stat. 3 & 4 Will. 4, c. 12, s. 26, did not apply to cases of this kind, so as to make the witness admissible. He could only become so by a release, as before the statute.

Per Cur.—We think the witness was competent without a release. The statute applies to all cases where the only interest is, that the verdict may be used for or against the witness. The verdict here might be used against him in an action by his master, and that is the only interest he has in the result of the action.

VII. OF THE DAMAGES†.

Duplicity. See tits. *Pleas—Replications.*

* Before that statute the servant was incompetent as a witness for him. (*Sherman* v. *Barnes*, M. & Rob. 69). As, in case for an injury to the plaintiff's cart, by driving against it:—Held, that the plaintiff's servant, who was driving his cart at the time, was incompetent without a release. (*Harding* v. *Cobley*, M. T. 1834, N. P. 6 C. & P. 664). So, in an action by the proprietor of a coach for an injury occasioned by the defendant's carter:—Held, that the coachman of plaintiff could not be called on as a witness for him without a release. (*Kerrison* v. *Coatsworth*, H. T. 1825, N. P., 1 C. & P. 645). So, in an action on the case against stage-coach proprietors for an injury done by the mismanagement of the coachman, whereby the plaintiff was struck by the luggage on the coach, the guard is not a competent witness for the defendants without a release. (*Whitamore* v. *Waterhouse*, 1830, N. P., 4 C. & P. 383. See *Michell* v. *Allstree*, 2 Lev. 172). But in an action for the negligent driving of the defendant's coach, the plaintiff gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this was cross-examined, with a view of shewing the goods to be the property of P., and the defendant called witnesses to prove them the property of P.:—Semble, that P. may be called as a witness in reply to prove that the goods were not his. (*Whittingham* v. *Bloxham*, T. T. 1831, N. P., 4 C. & P. 597).

† In case for injury to the defendant's horse by negligent driving, and after remaining six weeks at a farrier's, it was found to be permanently injured to the amount of 20*l.*:—Held, that the proper measure of damage was the amount of the farrier's charges for keep and attendance, and the difference in the value at the time of the injury, and at the end of the six weeks, but that the plaintiff could not claim the hire of another horse in the interval. (*Hughes* v. *Quentin*, M. T. 1838, N. P., 6 C. & P. 703).

Duress*. See also tit. *Bills and Notes.*

Dying Declaration†.

REX *v.* SCAIFE, 1836. N. P. 1 *M. & Rob.* 551.

On an indictment, dying declarations in favour of the prisoner are admissible.

ON an indictment for manslaughter, it appeared that a quarrel took place, and the prisoner knocked the deceased down, and kicked him, which caused his death. A surgeon was called to give evidence as to the cause of death, and stated, that he found the deceased in a state from which he could not by possibility recover, and that he told him so; and that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better. That the deceased afterwards said to the witness: "I don't think he would have struck me if I had not provoked him.

Coleridge, J., received the evidence, observing, that it might have an influence on the amount of punishment.—Verdict, guilty.

* To constitute duress of imprisonment, the imprisonment must be unlawful. (*Anon.*, T. T. 1651, K. B., 1 Salk. 68). To effect a duress per minas it must be to the person, and not his goods. (*Rex* v. *Southerton*, H. T. 1805, K. B., 6 East, 140). As to threaten a prosecution for penalties. (*Sumner* v. *Ferryman*, H. T. 1708, K. B., 11 Mod. 202).

† Dying declarations of the deceased, made on the day he was wounded, and when he believed he should not recover:—Held admissible, although he did not die until eleven days afterwards, and although the surgeon did not consider his case hopeless, and told the deceased so. (*Rex* v. *Mosley*, 1824, N. P. 1 Moody C. C. 97.

If a person, whose death is the subject of a charge of manslaughter, express an opinion that she shall not recover, and make a declaration; and at a subsequent part of the same day asks a person, whether he thinks she will "rise again:"—Held, that this shewed such a hope of recovery as rendered the previous declaration inadmissible. It is no objection against a declaration in articulo mortis, that it was made in answer to questions put to the deceased by the surgeon, and not a continuous statement made by the deceased. (*Rex* v. *Fagent*, 1835, N. P., 7 C. & P. 238).

On the question, whether a declaration of a deceased person be admissible as a declaration in articulo mortis, the Judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. (*Rex* v. *Spilsbury*, 1835, N. P., 7 C. & P. 187).

Where the deceased, at the time of making a statement as to the cause of her death to the medical person, stated, that she hoped he would do what he could for her, for the sake of her family:—Held, that the expression of such a hope excluded the declaration; to render it admissible it must be made under the impression of an almost immediate dissolution. (*Rex* v. *Crockett*, 1831, N. P., 4 C. & P. 544). Although, where any hope of recovery exists, however slight, the dying declarations are inadmissible; yet, where the party, after being assured that he must die, and the magistrate previous to receiving them desired him as a dying man to speak the truth, to which the deceased replied that he would, the Judge, (*Tindal*, C. J.), held them to be admissible. (*Rex* v. *Bonner*, 1834, N. P., 6 C. & P. 386).

If a declaration in articulo mortis be taken down in writing, and signed by the party making it, the Judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. (*Rex* v. *Gay*, 1835, N. P., 7 C. & P. 230).

Easement*.

HEBBERT *v.* THOMAS, H. T. 1835. Ex. 1 *C., M. & R.* 861.

Where a yard is attached to several houses, and no mention made in the demises, the presumption is, that it is an easement.

THE owner of several tenements, with a yard adjoining, and a pump therein, which the tenants were in the habit of using, and of passing over the yard, demised the houses by parol, but there was no evidence whether the yard formed part of the demise. In an action by one tenant against the landlord for excluding him from the yard—

The Court held, that the jury were improperly directed to say, whether, at the time of the demise, the landlord had reserved the yard, the question being, whether he had demised it; the presumption was, not that it was part of the demised premises, but an easement therein granted to each of the lessees.

BROWN *v.* WINDSOR, E. T. 1830. Ex. 1 *C. & J.* 20.

If the declaration allege an injury to property which is in fact an easement, still the plaintiff may recover†.

IN an action on the case, the plaintiff alleged his possession of a dwelling-house, belonging to and supporting which there were certain foundations which he was then, and of right ought, to enjoy, and then alleged the wrongful excavating by the defendant of his soil adjoining a certain wall, which was thereby weakened and sunk, and the plaintiff's house supported thereon injured.

The Court held, that such averment amounted to an averment, not of property, but of an easement on such foundations; and the evidence establishing such easement on the foundations of the defendant's pine wall, and that the excavation was the cause of the injury, and through the careless mode in which it was done, the action was maintainable.

---

* An easement is a service or convenience which one neighbour has of another by charter or prescription without profit. (See Kitch. 105). A right to an easement, (as to a drain, water-course, or the like), through the court of another, being a freehold right, can be created only by deed. But a mere license for such an easement may be by parol, because until it be acted upon it may be countermanded. (See 5 B. & C. 221; S. C. 7 D. & R. 783). An easement may also be created by custom. (See Cro. Eliz. 362). But uninterrupted enjoyment of an easement for twenty years and upwards is no bar to an action, but is evidence from which the jury are to be directed to presume a grant. (See 2 Saund. 175). The enjoyment must have been with the consent of the owner of the inheritance. (See 2 Saund. 175 a; 2 Salk. 422). And where an easement by prescription is pleaded, another prescription cannot be pleaded in destruction of such easement. (See 9 Co. 576). A multitude of persons cannot prescribe for an easement. (See Cro. Jac. 170; 3 Leon. 254; 3 Mod. 274; Vin. Abr. 496).

† In a case for obstruction of an easement, a former joint owner in fee with the plaintiff, who had conveyed all her interest in the moiety to the plaintiff, with a covenant for title:—Held, not a competent witness for the plaintiff, nor rendered so by indorsement under 3 & 4 Will. 4, c. 42, ss. 26, 27. (*Steers* v. *Carwardine*, 1838, N. P., 8 C. & P. 570).

East Indies*.

East India Dock.

EAST INDIA COMPANY *v.* BAKER, T. T. 1837. C. P. 3 *Bing. N. S.* 860.

The 43 Geo. 3, c. 63, as to dues, only applies to the last voyage taken upon more than six voyages.

THE 39 Geo. 3, c. 89, prohibited the East India Company from employing in their regular service any ships except those which were contracted for six voyages, at the expiration of which it was usual to break up the vessels, and at that time the regular number of voyages to be performed by a ship in the East India trade was supposed to be six. The 43 Geo. 3, c. 63, allowed the East India directors, under certain conditions, to hire and take up vessels for additional voyages after the completion of the sixth. The 43 Geo. 3, c. 126, by which the East India Dock Company were constituted, in clause 5 enacts, "That in case such ship or vessel should have completed her regular number of voyages, or should not be continued in the East India trade, there should be allowed or returned in respect thereof for the last voyage of such ship or vessel in such East India trade the sum of 4*s.* out of every 14*s.* or 12*s.* respectively per ton," &c. A ship of the plaintiff's arrived at the docks upon her sixth voyage from India, after the 43 Geo. 3, c. 63—

The Court held, that the plaintiffs were not entitled to the drawback of 4*s.*, as, since the enactment, six voyages and the regular number to be performed by the ship were not synonymous, for, after that period, it did not follow that her sixth voyage was to be her last.

Ecclesiastical Court†.

WEST *v.* TURNER, E. T. 1837. K. B. 1 *N. & P.* 612.

In an action by a curate against

ASSUMPSIT for work and labour, and attendance of the plaintiff in preaching and celebrating Divine service in the parochial church

* Real estates of British subjects in India made assets for payment of debts by 9 Geo. 4, c. 33. New criminal law extended to East Indies by 9 Geo. 4, c. 74.

† By 3 & 4 Vict. c. 93, it is enacted, "That, after the passing of this act, it shall be lawful for the judicial committee of her Majesty's most honourable privy council, or the judge of any ecclesiastical court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is or may be hereafter, under any writ de contumace capiendo already issued, or hereafter to be issued, in consequence of any proceedings before the said judicial committee, or the judge of the said ecclesiastical court, for discharging such party out of custody; and such sheriff, gaoler, or other officer shall, on receipt of the said order, forthwith discharge such party: provided always, that no such order shall be made by the said judicial committee or judge without the consent of the other party or parties to the suit: provided

of Luckington, for the defendant, and at his request. The defendant pleaded in bar, that the rector being non-resident, his stipend was appointed by the bishop, according to the 57 Geo. 3, c. 99, s. 53; that certain differences arose touching the stipend and the arrears; and that the action was brought for such arrears. Demurrer, among other grounds, that the plea ought to have stated the nature of those differences.

his rector for salary, the summary jurisdiction of the bishop under the 57 Geo. 3, c. 99, is pleadable in bar*.

Per Cur.—The plea is good in point of law. The objections to the plea are two:—first, that the nature of the differences does not sufficiently appear; secondly, that the plea ought to have been pleaded in abatement. We have no doubt that the statement in this plea is sufficient. We cannot see why we should go into the nature of those differences. Then, is the jurisdiction of this Court taken away by the 74th section? No reasonable doubt can be entertained on this point, that the bishop alone is to have jurisdiction in such a case as the present, and that no other jurisdiction can interfere.

Ecclesiastical Persons†.

See tits. *Advowson—Simony.*

Rex *v.* Davie, H. T. 1837. K. B. 6 *A. & E.* 374.

By charter, the right of appointing a chaplain was in the governors, "una cum assensu of the major part of the inhabitants" of the vill. The Court held, that it was not essential that the assent should be given at the same time as the nomination by the governors, and that assent at a meeting, called subsequently, was a sufficient compliance with the charter. Held also, that the term "inhabitants" might receive its interpretation from the usage, and that a usage restricting the right of assent to the payers of church and poor rates, would be intended to be according to the charter.

Under the words of a charter, "una cum assensu," the assent need not be at the time of the nomination; and the word "inhabitants" will be interpreted from the usage.

Vaux *v.* Vollons, H. T. 1833. K. B. 1 *N. & M.* 307.

Debt for penalties on the statute 57 Geo. 3, c. 99, against a clergyman for non-residence. By the 40th section of the act, no

The service of notice to the

always, that, in cases of subtraction of church-rate for an amount not exceeding 5*l.*, where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the ecclesiastical court shall have been paid into the registry of the said court, there to abide the result of the suit; and the party so discharged shall be released from all further observance of justice in the said suit."

* The Consistory Court has power to order a proctor to refund money improperly in his hands. (*Morris* v. *Gardner*, H. T. 1833, B. C., 1 D. P. C. 524).

† By 1 & 2 Vict. c. 10, contracts by banking firms to be valid, although any spiritual persons may be partners. Before that statute, spiritual persons composing a banking company could not be a party to a bill or note, under 57 Geo. 3, c. 39, (*Hall* v. *Franklin*, H. T. 1836, Ex., 3 M. & W. 259; abridged ante, Vol. II., p. 252).

Renewal of leases by, restrained by 6 Will. 4, c. 20, explained by c. 64.

Apportionment of spiritual duties regulated by 2 & 3 Vict. c. 30.

bishop can only be made at the registry office.

action for penalties shall be commenced for any penalty until a notice in writing of such intended writ or process shall have been delivered to such spiritual persons, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the party who intends to sue, &c. It was proved that a notice of action was served on Mr. Buckle, the archbishop's deputy-registrar, at his own house, and Mr. Buckle took it the next morning to the registry office and placed it upon the desk, and informed the archbishop of it. A verdict, under the direction of the learned Judge, was found for the plaintiff. On motion to nonsuit—

Per Cur.—It appears to us that this was not a proper notice within this act. Our attention has very properly been called to the words of the act. The first part of the clause directs the mode of delivery to the party himself; and the object of the latter part of the clause is, that such a notice should be left at the registry, so that all parties who are at all connected with it may know what is about to be done. If it were sufficient to leave it with the deputy-registrar at his own house, the archbishop might not know anything about it; and it appears to me that the safer course is to adhere to the words of the act.

BEETHAM *v.* GREGG, H. T. 1834. C. P. 10 *Bing.* 353; S. C. 4 *M. & Scott*, 230.

The patron of a benefice with cure of souls, under value of 8*l.* in the King's books, accepting another benefice with cure of souls, vacates the former*.

THE patron of a benefice with cure of souls, under the value of 8*l.* in the King's books, being also the incumbent, accepted another benefice with cure, and thereupon presented a clerk to the ordinary, and who was afterwards admitted, instituted, and inducted on his presentation.

The Court held, that the first benefice became actually vacant from the time of the presentation made to the second, and that the party presented was consequently entitled to the tithes thereafter accruing from that time.

CAPEL *v.* CHILD, T. T. 1832. Ex. 3 *Tyrw.* 689; S. C. 2 *C. & J.* 559.

A requisition by the bishop cannot be lawfully issued until the incumbent has had an opportunity of being heard.

IN an action for money had and received, it appeared that a bishop issued a requisition under 57 Geo. 3, c. 99, s. 50, requiring the vicar of W. to nominate a curate with a stipend, on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of W. were inadequately performed by reason of the vicar's negligence. The vicar appointed no curate, and did not appeal to the archbishop. The bishop, after three months, licensed the Rev. A. B., clerk, as curate of W., with a stipend. The vicar refused to allow A. B. to officiate; upon which the bishop issued a mandate, or summons, to shew cause why the vicar should not pay the stipend due, and ultimately proceeded to sequestration.

The Court held, 1st, that a requisition founded upon stat. 57 Geo. 3, c. 99, s. 50, to nominate a curate, is in the nature of a judgment, and therefore such requisition is invalid, unless the incumbent has had a previous opportunity of being heard, either by citation or

* If by royal grant a prebend in a cathedral be annexed to the archdeaconry, upon institution and induction in the latter office he becomes prebendary in fact. (*Rex* v. *Dean of Rochester*, 3 B. & Ad. 95; abridged, post, tit. *Mandamus*).

otherwise, whether the bishop proceed by affidavit or on his own knowledge; and 2dly, that such a requisition, stating generally that the duties of the benefice are inadequately performed by reason of the negligence of the incumbent is insufficient, as it should specify the particulars of the negligence, or in what it consists.

ALIHIN *v.* HOPKINS, T. T. 1834. C. P. 1 *Bing. N. S.* 99.

A composition deed by a beneficed clergyman, that his income, after paying a curate, shall be received by a trustee for his creditors, is void under the 13 Eliz.

AN action was brought to recover the sum of 253*l.*, in which the defendant was indebted to the plaintiff. The defendant pleaded and relied on a composition deed, which, however, he had not himself signed, whereby his creditors agreed not to sue the defendant, in consideration that the future income of the defendant might be received by the Rev. H. Lee, or some other person duly appointed by the defendants, and applied in liquidation of the defendant's debts, after providing a competent stipend for a curate to serve the church. It appeared that the defendant was possessed of no income whatever, except the emoluments arising from a living with cure of souls, amounting to 148*l.* a year. The Rev. Mr. Lee had received the produce of the benefice; and after expending 90*l.* per annum for the paying of the curate and other necessary expenses, divided the surplus, with the defendant's consent, amongst his creditors. Upon the trial the plaintiff was, upon the production of the agreement, nonsuited, with leave to move to have a verdict entered for him for the amount of his demand.

The Court held the agreement void under stat. 13 Eliz. c. 20, although the agreement provided for the support of a curate to perform the duties of the living.

BENDRY *v.* PRICE, T. T. 1839. B. C. 7 *D. P. C.* 753.

So, a warrant of attorney given as an independent security for a bonâ fide sum, is not charging the benefice within 13 Eliz., c. 20*.

FOR a bonâ fide loan, the defendant executed a lease for 99 years of his living, and on the same day executed a warrant of attorney for the same amount, reciting in the defeazance that it was given as a collateral security; and that the sum was further secured by the demise.

The Court held, that the lease being void did not affect the validity of the warrant; and that the warrant being an independent security for a loan was not a charging the benefice within 13 Eliz. c. 20, and the sequestration was the ordinary one of execution, and not affected by the statute.

FLIGHT *v.* SALTER, H. T. 1831. K. B. 1 *B. & Ad.* 673.

But, a warrant of attorney given to secure an annuity†, and expressed to be with the intent that a

UPON a rule calling upon the plaintiff to shew cause why the grant of annuity mentioned in the affidavits should not be set aside, and why the judgment entered up on the warrant of attorney given to secure the same should not also be set aside. It appeared, that a clergyman granted an annuity which he covenanted to pay. He demised his rectory as a collateral security; and he gave a warrant

* And in determining whether such security amounts to a charging the benefice within the statute, the Court will not look for the intention of the parties beyond the instruments, nor receive affidavits for that purpose. (*Bishop* v. *Hatch*, T. T. 1839, B. C., 7 D. P. C. 763).

† The cases connected with an annuity charging a benefice are abridged ante, Vol. I., pp. 209, 210, 211.

sequestration might issue against the benefice, is void.

of attorney at the same time, which recited the grant and demise, and declared that the warrant of attorney was given to the *end and intent* that the grantor might immediately enter up judgment, sue out a sequestration, and continue it during the existence of the annuity.

The Court held, that this being the intent of the parties, the warrant of attorney was substantially a charge upon the living against the provisions of the 13 Eliz., c. 20; and the Court therefore set aside the sequestration. But, if a clergyman granted an annuity and charged it upon his benefice, covenanted to pay the annuity, and as a collateral security gave a warrant of attorney; but the defeazance ran in the usual form, where warrants of attorney are given by lay persons; and it was provided that no execution should issue, unless default should be made in payment of the annuity; that was distinguishable, and that the warrant of attorney might be considered as referable to the personal covenant to pay the annuity, and as giving a speedy execution in case of the non-performance of that covenant, and as free from the illegal part of the transaction—the charge upon the benefice.

COTTLE *v.* WARRINGTON, T. T. 1833. K. B. 6 *B. & Ad.* 447; S. C. 2 *N. & M.* 227.

The delivery of the writ of fi. fa. de bon. eccl. to the bishop binds benefice lands, the judgment alone does not affect them*.

BY this indenture the defendant covenanted with the plaintiff, that if he should exchange that living for any other living, he would within eight months change such living so to be gotten in exchange with the payment of the annuity. At the same time the defendant executed a warrant of attorney authorizing certain persons to confess judgment in an action for 1800*l.* at the suit of the plaintiff. The annuity being in arrear, —— entered up judgment on the warrant of attorney and issued execution, and sequestered the living. Subsequently execution was taken out on the judgment on the warrant of attorney, and a fi. fa. de bonis ecclesiasticis issued to the Archbishop of Canterbury; and subsequently, for each half-year's annuity and the costs, similar writs had from time to time been issued, and by successive sequestrations the vicarage of Peake has been sequestered down to the present time.

The Court was of opinion, that the lands in this case were affected by the writ of execution and not by the judgment, and consequently the stat. 8 Geo. 2 did not require that the judgment should for this purpose be registered.

* It is a good objection to a rule requiring a bishop to make his return to a levari facias, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served upon the bishop. A bishop cannot be required to make a return of what has been levied under a levari facias, previous to his coming into office. (*Phillips* v. *Berkeley*, M. T. 1836, B. C., 5 D. P. C. 279).

Ejectment.

I. RELATIVE TO THE DEFINITION AND NATURE OF, AND HOW COMMENCED, p. 509.

II. RELATIVE TO WHETHER EJECTMENT OR TRESPASS, p. 509.

III. RELATIVE TO THE REQUISITES GENERALLY ESSENTIAL TO SUPPORT THE ACTION.

(*a*) As to the title.

1. *In general*, p. 509.
2. *By Statute of Limitations*, p. 511.

(*b*) As to the entry, p. 514.

(*c*) As to the notice to quit, p. 514.

(*d*) As to demanding possession, p. 514.

IV. RELATIVE TO THE PERSONS BY WHOM IT MAY BE MAINTAINED, p. 515.

V. RELATIVE TO THE PERSONS AGAINST WHOM IT MAY BE MAINTAINED, p. 516.

VI. RELATIVE TO THE THINGS FOR WHICH IT MAY BE MAINTAINED, p. 517.

VII. RELATIVE TO THE OUSTER, p. 518.

VIII. RELATIVE TO THE DECLARATION.

(*a*) In general.

1. *Whether by Bill or Original*, p. 518.
2. *How intitled*, p. 518.
3. *Venue*, p. 519.
4. *Formal Commencement of*, p. 520.
5. *Parties*, p. 520.
6. *Day*, p. 520.
7. *To be written on one Side of the Paper only*, p. 521.

(*b*) Formal parts.

1. *Description of the Premises or Subject-Matter of the Action*, p. 521.
2. *Description of the Situation*, p. 521.
3. *Statement of the Demise*, p. 522.
4. *Statement of the Entry*, p. 523.
5. *Statement of the Ouster*, p. 523.

VIII. RELATIVE TO THE DECLARATION—(*continued*).

(*c*) OF THE NOTICE TO APPEAR, p. 523.

(*d*) AS TO THE SERVICE.

1. *Of Rule, H. T.* 4 *Will.* 4, p. 525.
2. *At what Time*, p. 525.
3. *On whom.*

1st.—*In general.*

1. *Of the general Rule*, p. 526.
2. *Upon the Tenant himself*, p. 526.
3. *Upon the Wife*, p. 526.
4. *Upon the Mother or Sister*, p. 528.
5. *Upon the Son*, p. 528.
6. *Upon the Daughter*, p. 528.
7. *Upon the Nephew or Niece*, p. 529.
8. *Upon the Servant*, p. 529.
9. *Upon Occupiers as contradistinguished from Tenants*, p. 531.

2nd.—*In particular.*

1. *Where there are several Tenants*, p. 531.
2. *Upon One who personates or represents the Tenant*, p. 531.
3. *Where Tenant resists the Service, or refuses to be seen*, p. 531.
4. *Upon Administratrix and Executor*, p. 532.
5. *In case of Bankruptcy*, p. 532.
6. *In Ejectment for a Chapel*, p. 533.
7. *Connected with Companies*, p. 533.
8. *As to Foreigners*, p. 533.
9. *As to Joint-Tenants*, p. 533.
10. *As to Mortgagees*, p. 534.
11. *As to Overseers*, p. 534.
12. *As to Prisoners*, p. 534.

4. *Where the Possession is vacant*, p. 534.
5. *Off the Premises*, p. 534.
6. *As to being good for Part and bad as to Residue*, p. 534.
7. *As to the Explanation and Acknowledgment thereof*, p. 535.
8. *Affidavit of*, p. 535.

(*e*) AS TO THE AMENDMENT OF, p. 537.

IX. RELATIVE TO EJECTMENTS UNDER THE 1 GEO. 4, c. 87.

(*a*) TO WHAT CASES IT EXTENDS, p. 537.

(*b*) DECLARATION AND NOTICE TO APPEAR, p. 539.

(*c*) OF THE AFFIDAVIT, p. 539.

(*d*) OF THE RECOGNIZANCE, p. 540.

(*e*) OF THE CONSENT RULE AND JUDGMENT, p. 541.

(*f*) OF THE EXECUTION, p. 542.

(*g*) OF THE COSTS, p. 542.

X. RELATIVE TO EJECTMENTS UNDER 11 GEO. 4 & 1 WILL. 4, c. 70, p. 542.

XI. RELATIVE TO EJECTMENTS ON A VACANT POSSESSION, AND NO DISTRESS, p. 544.

XII. RELATIVE TO THE ANCIENT MODE OF PROCEEDING, AND WHEN IT MUST BE OBSERVED, p. 545.

XIII. RELATIVE TO THE APPEARANCE AND JUDGMENT AGAINST THE CASUAL EJECTOR FOR NON-APPEARANCE.

(*a*) WHEN THE PARTIES APPEAR, p. 546.

(*b*) WHEN THE PARTIES DO NOT APPEAR, AND OF THE JUDGMENT AGAINST CASUAL EJECTOR, p. 546.

XIV. RELATIVE TO THE LANDLORD'S APPEARANCE, AND THE TENANT'S NOT GIVING THE LANDLORD NOTICE OF EJECTMENT, p. 550.

XV. RELATIVE TO THE CONSENT RULE, p. 552.

XVI. RELATIVE TO BAIL, p. 553.

XVII. RELATIVE TO THE EFFECT OF BRINGING, p. 553.

XVIII. RELATIVE TO CONSOLIDATING ACTIONS, p. 553.

XIX. RELATIVE TO THE PLEAS.

(*a*) GENERAL ISSUE, p. 554.

(*b*) OF SPECIAL PLEAS, p. 554.

(*c*) SIGNING JUDGMENT FOR WANT OF, p. 554.

XX. RELATIVE TO THE REPLICATION, p. 554.

XI. RELATIVE TO THE ISSUE, p. 554.

XXII. RELATIVE TO THE EVIDENCE.

(*a*) Of defendant's possession, p. 555.

(*b*) Of the title, p. 555.

(*c*) Of the entry, p. 556.

(*d*) Of the premises, p. 556.

(*e*) Of the ouster, p. 557.

(*f*) Of written documents and statements by deceased witnesses, p. 557.

(*g*) Who to begin, p. 558.

XXIII. RELATIVE TO THE WITNESSES, p. 558.

XXIV. RELATIVE TO THE TRIAL, p. 560.

XXV. RELATIVE TO THE VERDICT, p. 560.

XXVI. RELATIVE TO THE JUDGMENT, p. 560.

XXVII. RELATIVE TO THE DAMAGES, p. 561.

XXVIII. RELATIVE TO THE COSTS.

(*a*) Security for, p. 561.

(*b*) Plaintiff or defendant, when entitled to.

1. *In general*, p. 562.

2. *Under* 1 *Geo.* 4, *c.* 87, p. 563.

(*c*) Liability of strangers for, and right to. p. 563.

(*d*) Remedy for, p. 563.

XXIX. RELATIVE TO THE EXECUTION.

(*a*) In general, p. 564.

(*b*) Under 1 Will. 4, c. 70, p. 565.

XXX. RELATIVE TO THE VENIRE DE NOVO, p. 565.

XXXI. RELATIVE TO THE NEW TRIAL AND SECOND ACTION FOR THE SAME PREMISES, p. 566.

XXXII. RELATIVE TO THE WRIT OF ERROR, p. 566.

XXXIII. RELATIVE TO THE SETTING ASIDE AND STAYING PROCEEDINGS, p. 567.

XXXIV. RELATIVE TO REMOVAL OF THE ACTION, p. 570.

I. RELATIVE TO THE DEFINITION AND NATURE OF*, AND HOW COMMENCED†.

II. RELATIVE TO WHETHER EJECTMENT OR TRESPASS‡.

III. RELATIVE TO THE REQUISITES GENERALLY ESSENTIAL TO SUPPORT THE ACTION.

(*a*) As to the title.

1. *In general.*

DOE *d.* MANTON *v.* AUSTIN, T. T. 1832. C. P. 2 *M. & Scott,* 107 ; S. C. 9 *Bing.* 41.

A tenant cannot dispute the title of the lessor§,

IN ejectment, a question arising as to the tenant disputing his lessor's title—

The Court said, the principle is, that a tenant shall not contest his landlord's title; on the contrary it is his duty to defend it. If he objects to such title let him go out of possession.

FRANCIS *v.* DOE *d.* HARVEY, 1839. Ex. Chamber. 4 *M. & W.* 331; S. C. 7 *D. P. C.* 523.

or if he has admitted his landlord's right by the payment of rent.

IN ejectment, it was proved, that the defendant, on the 1st of January, 1826, and then to the date of the demises in the declaration mentioned, was a partner in the Company of Adventurers, working the Consolidated Mines in Gwennap; and that the company had at various times, between Lady-day, 1826, and Lady-day, 1836, paid rent to the lessor of the plaintiff for the use and occupation of the premises mentioned in the declaration, half-yearly, at Michaelmas and Lady-day; and that, a little before Michaelmas, 1835, the lessor of the plaintiff gave to the company a notice to quit the aforesaid premises at Lady-day following. Applications after this notice were made to the lessor of the plaintiff by the company for a renewal of their term in the premises after the expiration of the notice. On a bill of exceptions—

The Court held, 1st, that the defendant was estopped from dis-

* An ejectment is a possessory action, adopted since the discontinuance of real actions as a general remedy for the recovery of lands or tenements, in which the party seeking to recover has the legal interest and right of entry. (See Petersdorff's Sup. Blac. 145).

† An ejectment is a mixed action, and commenced by declaration and not writ, although the Uniformity of Process Act, (2 Will. 4, c. 39), amended by 3 & 4 Will. 4, c. 67, directs, that all actions shall be commenced by summons or capias. The statutes apply only to personal and not to real or mixed actions.

‡ A tenant at sufferance, who is turned out of possession by his landlord without any demand of possession, cannot maintain ejectment, but may maintain trespass. (*Doe* v. *Murrell,* 1837, N. P., 8 C. & P. 134).

§ If a lessor who has only an equitable title grants a lease, he has, as against his lessee, a good title by estoppel; but if, after the lease, the lessor by a mortgage-deed grants all his interest in law and in equity to a mortgagee, the lessee may give as evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease. (*Doe* v. *Edwards,* H. T. 1834, N. P., 6 C. & P. 208).

puting the title of the plaintiff; and secondly, that an ejectment would lie on a demise from the plaintiff, although he was at that time a member of the company.

DOE *d.* JOHNSON *v.* BAYTRUP, E. T. 1835. K. B. 4 *N. & M.* 837; S. C. 3 *Ad. & E.* 188.

And even a defendant who has obtained possession through fraud or license cannot dispute the party's title through whom he obtained such possession.

IN ejectment, it appeared that Johnson, the husband of the lessor of the plaintiff, had been in possession of the land, and had built the cottage upon it, and had continued to reside in it with his second wife, the lessor of the plaintiff, till his death; that a lease from Mr. Poyntz was made to the lessor of the plaintiff, dated the 28th May, 1833. It also appeared that the defendant obtained the key of the garden, to which were attached the keys of the house, from the plaintiff to get some vegetables; and the jury, having found a verdict for the defendant, in answer to a question from the learned Judge, stated their opinion to be, that the possession was fraudulently obtained by the defendant under colour of going to collect vegetables.

The Court held, that in an action of ejectment to recover back possession, the defendant could not dispute the title of the lessor of the plaintiff.

DOE *v.* BIRCHMORE, H. T. 1839. K. B. 1 *P. & D.* 448.

A devise from a party in actual possession is sufficient primâ facie evidence of title.

A PERSON was let into possession of premises as a servant; his master died, having devised the same to another person. The devisee brought an ejectment and the servant was served. Another party, having obtained a rule to defend as landlord, appeared at the trial.

The Court held, that he was bound by the title of the servant, and could not compel the devisee to prove the title of the devisor.

DOE *d.* DAVIS *v.* DAVIS, M. T. 1823. Ex. 12 *Price*, 756.

Formerly, levying a fine with proclamations, where the possession was merely permissive, conveyed no title*.

A YOUNGER son, living with his father previous to his death, continued in possession, and afterwards levied a fine with proclamations.

The Court held, that the heir might maintain ejectment without actual entry; the original possession being permissive, and the continuance after the death of the father not founded on a new wrongful entry when the freehold was vacant, so as to constitute a disseisin or sufficient interest to give operation to the fine.

DOE *d.* STRODE *v.* SEATON, M. T. 1835. Ex. 2 *C., M. & R.* 728; S. C. 1 *Tyrw. & Gr.* 29.

But the assignee of the lessee is not estopped from shewing the determination of the lessor's interest as tenant for life.

IN ejectment, it appeared that a lessor granted a lease for twenty-one years, and the lessee covenanted to pay rent to him and his heirs or assigns, and also to deliver up the possession to him, his heirs, or assigns, at the expiration of the lease.

The Court held, that the assignee of the lessee after the death of

* But see 3 & 4 Will. 4, c. 74, *post*, tit. *Fines.*

the lessor, and after the expiration of the lease, was not estopped from shewing that the latter had only an estate for life in the demised premises.

DOE *v.* WAINWRIGHT, T. T. 1836. K. B. 5 *Ad. & E.* 520.

On several demises, evidence against one title is not admissible to invalidate another.

IN an action of ejectment on demises of A. and B., the plaintiff having tendered evidence in support of the title of both, and the defendant having also offered evidence admissible only against the title of one—

The Court held, that the plaintiff might abandon that demise; and that such evidence was not admissible to impeach the title of the other.

---

2. *By Statute of Limitations.*

By 3 & 4 Will. 4, no ejectment lies but within twenty years after title accrued.

BY 3 & 4 Will. 4, c. 27, s. 2, it is enacted, "That after the 31st day of December, 1839, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty-one years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

By s. 7, in case of tenant at will, the right accrues at the end of one year.

By s. 7, it is enacted, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

By s. 34, at the end of the period of limitation the party's right is extinguished.

By s. 34, it is enacted, "That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

DOE *v.* EDMONDS, T. T. 1839. Ex. 6 *M. & W.* 295.

Under 3 & 4 Will. 4, c. 27, the acknowledgment of title must be clear and distinct.

LANDS in 1786 were settled on the wife for life, with remainder to her issue in tail, and in 1818 the estate tail was enlarged into a fee, and a new estate tail carved out, with limitation in tail to the lessor of the plaintiff. The party in possession of the lands claimed, by letter, stating, that if matters were contested, he should establish a legal right, yet that, under all circumstances, he would accede to a proposition to accept a lease.

The Court held, that it did not amount to any acknowledgment of title to satisfy the 3 & 4 Will. 4, c. 27.

DOE *v.* THOMPSON, T. T. 1838. Q. B. 2 *N. & P.* 656; S. C. 1 *N. & P.* 215.

The heir of a tenant at will, who has been in possession upwards of twenty years, cannot, under 3 & 4 Will. 4, c. 27, s. 2, on that ground recover in ejectment.

IN ejectment the jury found, that the father of the lessor of plaintiff, his son and heir, had been in possession for upwards of twenty years before his death, as tenant at will to the grandfather of the lessor of plaintiff.

The Court held, that under stat. 3 & 4 Will. 4, c. 27, s. 2, which limits the time for recovering lands by action to twenty years after the right accrues, (s. 34, which extinguishes the title at the determination, or at the end of one year from the commencement of such tenancy), no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed.

DOE *v.* LAWLEY, E. T. 1834. K. B. 3 *N. & M.* 331.

A possession of twenty years is not neutralised by shewing near relationship*.

THE cottage and land in question were enjoyed by Abigail Monk as her own property, until the 5th April, 1795, when she died, leaving several children. The eldest was Edward Monk, whose eldest son, William, is now living. Patience, the youngest daughter of Abigail (having married in 1780 William Draper), after the death of her mother in 1795, entered and continued in possession until the 1st September, 1805, when she died, leaving William Draper (the lessor of the plaintiff) her eldest son and heir-at-law. William Draper, the father, continued in possession, and married Mary Lawley, who resided on the premises with her husband until his death, in the latter part of 1815, and afterwards until her own death. Her son (the defendant) then entered, whereupon this ejectment was commenced. The defendant set up the title of William Monk, and contended that the possession of Patience, from 1795 to 1805, could not be considered as adverse to her elder brother, and that the possession of her husband, from 1805 to 1815, was in the nature of a tenancy by curtesy, and, being derived from her, would be subject to the same defects as her possession.

Patteson, J., however, considered the possession as adverse, and directed the jury to find for the plaintiff, which they accordingly did.

Lord *Denman*, C. J.—I see no ground for disturbing the verdict, on the ground of the mere relation of brother and sister.

DOE *d.* WATTS *v.* MORRIS, E. T. 1834. C. P. 2 *Bing. N. S.* 189.

The inclosure of C own lands above twenty years without license, does not bind the Crown.

IN ejectment, it appeared that waste of a Crown manor had been inclosed without license above twenty years before the conveyance from the Crown to the lessor of plaintiff—

The Court held, that such inclosed lands did not pass from the Crown to the purchaser, under the contract and certificate of the Commissioners of Woods and Forests, and that the action of ejectment could not be maintained.

* But now, by 3 & 4 Will. 4, c. 27, it is enacted (sect. 13), "That where a younger brother, or other relative of the person entitled as heir to the possession, or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

DOE *d.* HARDING *v.* COOKE, H. T. 1831. C. P. 7 *Bing.* 346; S. C. 5 *M. & P.* 181.

Prior possession for twenty-three years will supersede the effect of a later possession for ten, and confer a title on the plaintiff.

IN ejectment it was proved on the part of the lessor of the plaintiff, that the premises in question had been in possession of his father and himself by perception of the rent, from the year 1797 to the year 1819, during which (viz. in the son's time) the rent had been raised. On the part of the defendant it was proved, that he had been in the uninterrupted possession of the premises ever since 1819. Upon this evidence a verdict was found for the lessor of the plaintiff.

Per Cur.—We shall impeach no rule of law, by deciding in favour of the plaintiff. He has shewn a title by presumption, arising from a possession of above twenty years in his father and himself. The defendant proves a subsequent possession of eleven years. Thus we have presumption against presumption. Enough has been shewn, on the part of the lessor of the plaintiff, to put the defendant upon shewing a better title. If he has such title, he may still prove it by bringing another ejectment.

DOE *v.* WILKINS, M. T. 1835. K. B. 5 *N. & M.* 434.

It may be a question for the jury, whether the possession be held adversely or not*.

THIS was an action of ejectment: it appeared that a lease was granted to a feme covert, as to a widow (her husband being alive, and who survived her), and she assigned all her interest to her son, who took possession, and devised to the defendant. The lessor of the plaintiff claimed as administrator to the husband.

The Court held, that it was properly left to the jury to say, whether the possession was adverse to the mother.

DOE *d.* GRUBB *v.* GRUBB, E. T. 1830. K. B. 10 *B. & C.* 816.

But, the receipt of rent under equivocal circumstances does not constitute an adverse possession.

ON the death of the lessor of plaintiff's father in 1790, the estate descended on him although a younger brother; the defendant's father received the rents under equivocal circumstances, but in 1804 the elder brother received a half-year's rent, and marked and cut timber on the land, and directed a valuation to be made.

The Court held, that there was no sufficient evidence of adverse possession against the lessor of plaintiff, the tenant in possession having, in reply to an application in June, 1813, stated, that the connection as a tenant had ceased with him for several years. Held, also, that it was evidence of a prior disclaimer, and sufficient to support the demise, which was laid in May, 1813.

* Where a party had the key of the premises delivered to him by the lessor of plaintiff, and went in and enjoyed peaceable possession for nearly a year:—Held, that it was sufficient proof of title as against a party taking forcible possession. (*Doe* d. *Hughes* v. *Dyball*, E. T. 1829. N. P. 3 C. & P. 610).

But where the defendant came originally into possession in right of his wife, and continued in possession of it for sixteen years after her death:—Held, that the occupation in her lifetime could not be deemed an adverse possession by him against the heir-at-law. (*Doe* v. *Wing*, 1834. N. P. 6 C. & P. 538).

And where the party was in possession under an intended purchaser, being tenant at will and in equity the owner of the land, but liable to pay the purchase-money:—Held, that the cutting of timber was consistent with his holding in that character, and not an adverse possession. (*Doe* d. *Counsell* v. *Caperton*, 1839, N. P., 9 C. & P. 112).

DOE *v.* JAUNCEY, 1837. N. P. 8 *C. & P.* 99.

And declarations as to repairs may be received to shew that the possession was not adverse.

IN ejectment, it appeared that the widow continued to occupy, for above twenty years, premises which her husband had enjoyed for seventeen years.

Coleridge, J., held, that the heir was barred, unless the jury were satisfied that the mother occupied by permission and not adversely; and her declarations as to repairs were admissible to shew that her possession was not adverse.

(*b*) AS TO THE ENTRY*.

(*c*) AS TO THE NOTICE TO QUIT. See *post*, tit. *Notice to quit.*

(*d*) AS TO DEMANDING POSSESSION.

DOE *d.* BIASS *v.* HORSLEY, T. T. 1834. K. B. 3 *N. & M.* 567.

The power to enter and take profits, upon a rent-charge being in arrear and unpaid, enables the grantee to bring ejectment without a demand.

IN ejectment, it appeared that on the 21st August, 1800, Thomas Biass devised the premises in question to his son in fee, subject to an annuity of 30*l.* to his daughter Hannah, the lessor of the plaintiff, payable quarterly, and charged on the premises; and the testator declared his will to be, that if the annuity should be unpaid for twenty days after the day of payment, being lawfully demanded, it should be lawful for the said Hannah to enter and distrain; and in case the annuity should be behind and unpaid for forty days next after any of the days of payment, it should be lawful for the said Hannah to enter into and enjoy the lands so charged and receive the rents, &c., until she should be paid and satisfied all arrears. The defendant was the tenant of the mortgagee of the son of Thomas Biass. The jury found that there were five years of the annuity in arrear at the time of bringing the ejectment; but the learned Judge, being of opinion that a demand was necessary, and there being no proof of any such demand made, nonsuited the plaintiff, subject to a special case.

Denman, C. J.—We think that the plaintiff was entitled to recover, on the principle, that this is not a case of forfeiture in case of non-payment of the annuity, but only a right to enter and receive the profits till the arrears are satisfied. In the former case a demand is necessary, in the latter not.

* An entry is only necessary where it is requisite to rebut the defendant's title. (*Goodright* v. *Cator*, M. T. 1780, K. B., 2 Doug. 477). Hence, an actual entry was necessary to avoid a fine levied with proclamations according to 4 Hen. 7, c. 24; and an ejectment could not be brought until such entry had been made. (*Berrington* v. *Parkhurst*, H. T. 1737, K. B., 2 Stra. 1086). But at common law an actual entry was not necessary to avoid a fine without proclamations. But see 3 & 4 Will. 4, *post*, tit. *Fines.*

IV. RELATIVE TO THE PERSONS BY WHOM IT MAY BE MAINTAINED.

DOE *d.* RUTZEN *v.* LEURS, H. T. 1837. K. B. 5 *Ad. & E.* 277.

A landlord who elects to do what would occasion a forfeiture cannot afterwards maintain ejectment*.

IN ejectment, it appeared that the lease contained a covenant for repair, and that upon notice of defects the lessor might, within two months, enter and do repairs, and if the expenses were not paid by the lessee, that the lessor might distrain for them; there was also a power of re-entry upon the breach of covenant. The lessor afterwards gave notice that he should do certain repairs at the end of six months and charge the lessee with the expense, and upon the six months having elapsed the lessor gave notice to the lessee, that if he did not comply with certain terms within three days he should hold him to the covenants.

The Court held, that, upon the lessee not complying, the lessor could not maintain ejectment for the forfeiture; having elected the remedy for non-repair, the general power to re-enter did not revive by the three days' notice.

DOE *v.* WELLS, T. T. 1839. K. B. 2 *P. & D.* 396.

And a parol disclaimer by a lessee is insufficient on that ground to enable lessor to maintain an ejectment.

IN ejectment, it appeared that a tenant for a term of years, on being applied to for an acknowledgment of his tenancy, declared that the freehold was his own.

The Court said, that no case had been cited in which it has been held that a term of years is forfeited by mere words. A voluntary payment or other act of attornment might perhaps amount to forfeiture, but here there is no act done at all. Cases have been cited in which tenants are loosely said to have forfeited tenancies from year to year, but these are properly only cases in which they have not been allowed to insist on a notice to quit against their own assertions.

DOE *v.* TRESIDDER, M. T. 1840. Q. B. 1 *Gale & D.* 70.

A lease of copyhold is good without a license, so far as to support ejectment between the parties thereto.

IN ejectment, it appeared that copyhold lands were leased by the tenant, duly admitted, from six years to six years, if certain persons should so long live.

The Court held, that the lessee might maintain ejectment, although no custom of the manor to lease and no license obtained; the lease, although void as against the lord, was yet good as between the lessee and all others except the lord.

DOE *d.* BARKER *v.* GOLDSMITH, T. T. 1832. Ex. 2 *Tyrw.* 710; S. C. 2 *C. & J.* 674.

Under a devise to trustees to permit and suffer the wife to receive the

PREMISES were devised to trustees to permit and suffer the testator's wife to receive the rents for life or widowhood, and after to sell and divide the produce between his two children. The trustees joined with the widow and one of the children in a lease, setting out

* In an action of ejectment, the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises a short time before the bringing of the action. (*Doe* v. *Miller*, T. T. 1826, N. P., 2 C. & P. 348).

rents, the legal estate is still in the trustees, who alone can sue.

the respective interests, to the other, rendering rent to the two latter, with power of re-entry to the lessors and executors of the survivor. The widow survived the trustees, and in ejectment upon forfeiture—

The Court held, that, the legal estate being in the trustees, the other lessors being strangers to the legal interest, and their real title disclosed on the lease, they could not re-enter under a power to that effect; and, the declaration containing no demise by the representatives of the surviving trustee, the ejectment could not be supported.

DOE *v.* WHEELER, H. T. 1840. Q. B. 4 *P. & D.* 270.

The churchwardens and overseers may bring ejectment, notwithstanding the 4 & 5 Will. 4, and 5 & 6 Will. 4.

IN an action of ejectment by churchwardens and overseers to recover the possession of parish land—

The Court held, that the terms of the 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, s. 3, were not sufficient to divest the property in parish houses and lands out of the churchwardens and overseers, who are still entitled to maintain ejectment for them.

DOE *d.* WHITE *v.* ROE, M. T. 1839. C. P. 8 *D. P. C.* 71; S. C. 8 *Scott*, 146.

But commissioners of highway cannot maintain ejectment for encroachments on strips by the side of it*.

IN an action of ejectment by commissioners of highway against a party for encroaching on strips by the side of the highway—

The Court held, that the commissioners cannot be said to be in such possession of the highway as to maintain ejectment against a party encroaching on strips by the side of it.

DOE *d.* GILBERT *v.* ROSS, M. T. 1840. Ex. 7 *M. & W.* 102.

The heir-at-law of a party who has levied a fine may maintain ejectment†.

UPON a devise to M. for life, with power of appointment by deed or will, and in default thereof to the heirs of his body, with remainders over, M. levied a fine to the use of himself in fee, and died without issue. In ejectment by his heirs at law—

The Court held, that the fine created a discontinuance, and gave the conusor a tortious fee, and that the remainders over being divested, the heir at law of M. might recover in ejectment. The 3 & 4 Will. 4, c. 47, s. 38, could preserve the right of the remaindermen, and they might bring a formedon.

V. RELATIVE TO THE PERSONS AGAINST WHOM IT MAY BE MAINTAINED.

DOE *d.* WHITAKER *v.* HALES, H. T. 1831. C. P. 7 *Bing.* 322; S. C. 5 *M. & P.* 132.

Any thing which shews that the de-

IN ejectment by a mortgagee against the tenant of the mortgagor, it was proved that, on a day subsequent to the day of the demise laid in the declaration, the mortgagee obtained from the oc-

* But where a company, before incorporation, demised, and the act of incorporation made all previous contracts valid:—Held, that they might maintain ejectment. (*Doe* v. *Knebell*, 1836, N. P., 2 M. & Rob. 66).

† But see 3 & 4 Will. 4, c. 74, *post*, tit. *Fines*.

cupier a sum that was due from him to the mortgagor for rent, part of which money was appropriated by the agent in discharge of interest due upon the mortgage.

fendant has been treated by the lessor of the plaintiff, not as a trespasser, but a legal occupier, will defeat the action.

Per Cur.—The question now is, not whether the defendant was tenant to the lessor of the plaintiff, but whether the lessor of the plaintiff has not, by his conduct, recognised the defendant as being in the legal possession of the premises after the day of the demise. The lessor of the plaintiff having received the interest due to him out of the defendant's rent, he clearly cannot afterwards treat him as a trespasser. If the mortgagor and mortgagee had gone together to the defendant, and the former had demanded rent for a single day, after the 25th of December, 1829, and the mortgagee had taken it, he could not then have treated the defendant as a trespasser ab antecedenti. That would be neither law nor justice.

DOE *d.* COYLE *v.* COLE, 1834. N. P. 6 *C. & P.* 359.

Before a schoolmaster can be ejected from a parish schoolhouse, he must be removed from his office.

IN ejectment by the vicar to recover a school-house built partly on the alleged site of the churchyard:—Held, 1st, that the schoolmaster in possession could not be removed from the house, unless previously removed from the office; and, 2nd, that if the house, or part, were built on the site of a former school-house, granted before the disabling statutes, although on part of the churchyard, the plaintiff could not recover such part.

VI. RELATIVE TO THE THINGS FOR WHICH IT MAY BE MAINTAINED.

DOE *v.* MUSGRAVE, M. T. 1840. C. P. 1 *Scott, N. S.* 451; S. C. 1 *M. & J.* 625.

An ejectment will not lie for a "canonry," being a mere office,

THE defendant, by way of further security on a loan on mortgage, upon obtaining an appointment to a canonry in the King's chapel, at W., demised it in these terms,—"all that canonry of the defendant's at &c., and all glebes and other lands, messuages, tenements, &c., belonging thereto."

The Court held, that, the canonry being but an office to which nothing was of necessity attached of which the sheriff could deliver possession, a house belonging to the dean and chapter, and of which the canons had the mere right of occupation for enabling them the better to discharge the duties of the office, ejectment would not lie, and the effect of the deed not being a grant of the house, the doctrine of estoppel did not apply.

DOE *d.* EARL OF FALMOUTH *v.* ALDERSON, H. T. 1836. Ex. 1 *M. & W.* 210; S. C. 4 *D. P. C.* 701.

nor is it sustainable for a "*tin-bound.*"

THE consent-rule stated, that the defendant appeared to defend "a certain *tin-bound*," stating the abuttals.

The Court held, that ejectment was not maintainable for such; but it should have been for the mine worked under the tin-bound.

VII. RELATIVE TO THE OUSTER.

DOE *v.* HORN, H. T. 1840. Ex. 5 *M. & W.* 564.

Occupation by a company of the site of a railway is an ouster of the tenant in common.

ON the question, whether the pulling down of certain premises by one tenant in common, and the construction of a railroad on their site, amounted to an actual ouster of another tenant in common of the premises.

Per Cur.—There cannot be any doubt that the use of this land for the purposes of a railroad amounts to an ouster. How can the lessor of the plaintiff occupy this land as he wishes when it is intersected by rails, and traversed by steam-engines? Littleton, sect. 322, says, "That if two have an estate in common for term of years, and the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of ejectio firmæ of the moiety." Upon which Lord Coke, in his Commentary, observes, "If he drive out of the land any of the cattle of the other tenant in common, or do not suffer them to enter or occupy the land, this is an ejection or expulsion, wherefore he may have an ejectment for the moiety."

VIII. RELATIVE TO THE DECLARATION.

(*a*) IN GENERAL.

1. *Whether by Bill or Original*.*

2. *How intitled†.*

DOE *d.* HAINES *v.* ROE, M. T. 1832. C. P. 2 *M. & Scott*, 619.

It was doubted whether Rule, M. T. 3 Will. 4, applied to declarations in ejectment;

IN this case, the Court hesitated as to whether the Rule of Michaelmas Term, 3 Will. 4, as to intitling declarations, applied to declarations in ejectment.

DOE *d.* GILLETT *v.* ROE, T. T. 1834. Ex. 1 *C., M. & R.* 19; S. C. 4 *Tyrw.* 649.

but it was afterwards decid-

THE declaration, which was intitled generally of Easter Term, commenced in the old form by stating, that "John Doe, a debtor of

* An ejectment is a mixed action, and commenced by declaration, and not writ, although the Uniformity of Process Act, (2 Will. 4, c. 39), amended by 3 & 4 Will. 4, c. 67, directs that all actions shall be commenced by summons or capias. The statute applies only to personal, and not to real actions.

In the King's Bench, the proceedings may be either by bill or original; the latter, however, is the most usual and preferable mode, because no writ of error can be brought except in Parliament. And in the Common Pleas, the declaration is always framed as if by original. (See Adams, Ejectment, 181).

† Where the declaration omitted the title of the Court, but the notice required the defendant to appear in the Queen's Bench:"—Held sufficient. (*Doe* d. *Tattersall* v. *Roe*, T. T. 1840, B. C., 8 D. P. C. 612.—S. P. *Doe* v. *Newman*, M. T. 1840, B. C., 9 D. P. C. 131).

our Sovereign Lord the King, comes before," &c., and concluded " to the damage of the said John Doe, of" &c., " whereby he is the less able to pay," &c. On motion to set aside the declaration and service thereof for irregularity, on the ground that it was not intitled and did not commence in the manner prescribed by R. 15, Reg. Generales, M. T. 3 Will. 4—

ed that declarations in ejectment are not within the Rules, M. T. 3 Will. 4*.

Per Cur.—The Rules of Michaelmas Term, 3 Will. 4, were framed upon the act of Parliament, and apply only to cases to which the act applies. The act is " An Act for the Uniformity of Process in personal Actions," and its provisions extend only to such actions. Ejectment being a mixed action is not, therefore, within either the act or the Rules.

Doe *d.* Ashman *v.* Roe, M. T. 1834. M. P. 1 *Bing. N. S.* 253; S. C. 1 *Scott*, 166.—S. P. Doe *d.* Evans *v.* Roe, M. T. 1834. K. B. 2 *A. & E.* 11.

On motion for judgment against the casual ejector, the declaration was intitled thus: " In the Common Pleas, June 12, 1834."

Still declaration may be intitled as of " a particular day," or " term."

The Court held the intitling sufficient, notwithstanding the Rule, M. T. 3 Will. 4, did not apply to actions of ejectment.

Doe *v.* Roe, T. T. 1833. B. C. 2 *D. P. C.* 186.—S. P. Doe *d.* Fry *v.* Roe, E. T. 1833. C. P. 3 *M. & Scott*, 371.—S. P. Doe *d.* Green *v.* Roe, T. T. 1840. 8 *Scott*, 385.

On motion for judgment against the casual ejector, the peculiarity in the case was, that the declaration was intitled, " Easter Term, 4 Will. 4," no such term having yet arrived.

And where intitled of a term not arrived :—Held sufficient.

The Court held the error to be immaterial, and referred to an anonymous case in 2 Chitt. Rep. 172, where *Taunton*, J., held such a declaration sufficient.

---

3. *Venue.*†

* A declaration in ejectment being intitled as of " Trinity Term in the fourth year of the reign of Queen Victoria," instead of the " third year:"—Held irregular. (*Doe* d. *Vincent* v. *Roe*, M. T. 1840, C. P., 9 D. P. C. 43; *Doe* d. *Gowland* v. *Roe*, M. T. 1836, B. C., 5 D. P. C. 273).

But if the date of the notice, in a declaration in ejectment, conveys sufficient information to the tenant, the title is immaterial. (*Doe* d. *Evans* v. *Roe*, H. T. 1837, C. P., 5 D. P. C. 508.—S. P. *Doe* d. *Wills* v. *Roe*, E. T. 1835, B. C., 3 D. P. C. 380).

On an application for judgment against the casual ejector, it appeared that the declaration was wrongly intitled of Michaelmas Term, 1840, with notice to appear in the " next Michaelmas Term." The declaration was served before the commencement of the term, and the tenant then said that he knew that no step could be taken until the following March. The Court refused to grant the rule. (*Doe* d. *Channel* v. *Roe*, M. T. 1840, B. C., 9 D. P. C. 67).

† The venue in the margin in the declaration in ejectment is immaterial, if the venue in the body of the declaration be correct. (*Doe* d. *Goodwin* v. *Roe*, H. T. 1835, B. C., 3 D. P. C. 323).

4. *Formal Commencement of.*

DOE *d.* BLOXAM *v.* ROE, H. T. 1838. Ex. 6 *D. P. C.* 388; S. C. 3 *M. & W.* 187.

The formal commencement of the declaration in ejectment is not material.

ON motion to set aside a declaration in ejectment for irregularity. —It was framed as if the rules of Michaelmas Term, 3 Will. 4, applied to declarations in ejectment. It commenced, "John Doe was attached to answer," &c., and not "John Doe, a debtor to our Sovereign Lady the now Queen," &c.; and the quo minus clause at the end was also omitted.

Parke, B.—It has been held in the Common Pleas and Queen's Bench, that an impossible title in a declaration in ejectment may be rejected. (*Doe* d. *Gore* v. *Roe*, 3 Dowl. P. C. 5). The ground of those decisions has been that the real information is contained in the notice at the foot of the declaration. That principle will equally apply here.—Rule refused.

DOE *d.* SIMPSON *v.* ROE, E. T. 1838. B. C. 6 *D. P. C.* 469.

The declaration having no attorney's name is no objection.

ON a rule to shew cause why the declaration in this case should not be set aside, on the ground that there was no attorney's name in it—

Patteson, J.—If the tenant has appeared, the objection is cured; if he has not appeared, he cannot be admitted to take the objection.

---

5. *Parties.*

DOE *v.* CLIFTON, T. T. 1837. Q. B. 4 *Ad. & E.* 809.

The names of lessors will be struck out, where tenants appear who claim under them.

IN ejectment, the Court allowed the names of certain lessors to be struck out, the tenants appearing to claim under them, and the action brought to protect their interests against the other lessors, although alleged to be merely trustees and indemnity offered.

DOE *d.* STAINTON *v.* ROE, H. T. 1819. K. B. 6 *M. & S.* 203.

A misnomer is no ground for setting aside the declaration.

IN ejectment, the Court refused to set aside service of the declaration on an affidavit of misnomer in the Christian name of the tenant in possession, it would in effect be to allow the benefit of a plea in abatement for misnomer in ejectment.

---

6. *Day.*

DOE *v.* WELLS, T. T. 1839. Q. B. 2 *P. & D.* 396.

A demise, on the day of a supposed forfeiture accruing, to commence from two days previous, is good.

IN ejectment, the demise was laid in the declaration on the 17th of October, 1836, to hold from the 15th of October in the same year. The defendants were possessed under a lease for 99 years, determinable on their lives. On the part of the lessors of the plaintiff, it was proved, that, after an unsuccessful application to the

defendant for quit rent, the son of the lessor of the plaintiff, Graves, called on him on the 17th of October, and said, "I believe you are in possession of some property in right of your wife, of which Wells claims the remainder." The defendant said, "I know all about that." He said, "We are going to proceed against Wells for his part, and we must include you unless you will pay some acknowledgment." The defendant refused. After some more words, Mr. Graves asked him, "If he claimed the whole as his freehold?" He said, "With George Chitty."

The Court held, that the day of the demise in the declaration was sufficiently well laid: "On the 17th of October, to hold from the 15th."

---

7. To be written on one side of the Paper only.*

(*b*) Formal parts of.

1. Description of the Premises or Subject-Matter of the Action.

Doe *d.* Lawrie *v.* Dyeball, E. T. 1828. K. B. 8 *B. & C.* 70; S. C. 2 *M. & R.* 184.

"Tenement" is an incorrect expression in a declaration; but judgment will not be arrested where it is used in conjunction with "messuage."

Error, to reverse a judgment for the plaintiff in ejectment, which was brought for a messuage and tenement. The case of *Goodtitle v. Otway*, (8 East, 357), was relied on, where a motion having been made in arrest of judgment upon a similar ground, the difficulty was obviated by entering up judgment for the messuage only.

Per Cur.—It is a settled rule, that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts. That being so, there is no ground for reversing the judgment in question.—Judgment affirmed.

---

2. Description of the Situation.

Doe *d.* Rogers *v.* Bath, M. T. 1833. K. B. 2 *N. & M.* 440.

The declaration must state where the premises are situate,

The declaration in ejectment stated the demise in a particular parish, but contained no averment as to where the premises were situate. On motion in arrest of judgment—

Per Cur.—We do not like to go so far as to hold this declaration to be sufficient; though very anxious to do so, we do not feel authorized. We think that the amendment should be made on payment of costs, and of this rule.—Rule accordingly.

* The service of several copies of declarations in ejectment was, in this case, held irregular, it appearing that both sides of the paper had been written on, to the prejudice of the then existing revenue laws, imposing a duty of 4*d.* a sheet. (*Doe* d. *Irwin* v. *Roe*, T. T. 1822, K. B., 1 D. & R. 562).

DOE *v.* GUNNING, T. T. 1837. K. B. 2 *N. & P.* 260.

as, "in the county of S.;"

THIS was an action of ejectment. The lands sought to be recovered were described as situate in the county of S., but no parish or place was mentioned. On motion in arrest of judgment—

The Court held, (*Littledale*, J., dubitante), that the declaration was good.

DOE *d.* BOYS *v.* CARTER, T. T. 1827. Ex. 1 *Y. & J.* 492.

and it is sufficient if the parish be described by the name by which it is usually called.

IN ejectment, the premises were described as in the parish of St. Luke, in the county of Middlesex, and it appeared that there were two parishes of St. Luke in the county—viz. St. Luke, Chelsea, and St. Luke, Old Street; but that the latter was more frequently called St. Luke, Middlesex.

The Court held, that the variance was not material; it is sufficient that the parish is described by the name by which it is usually known.

---

3. *Statement of the Demise.*

DOE *d.* BLIGHT *v.* PITT, E. T. 1840. Q. B. 11 *Ad. & E.* 842; S. C. 4 *P. & D.* 278.

Under a joint demise, a several title cannot be shewn.

IN ejectment, it appeared that M., after a devise of his property real and personal to P., purchased lands in fee, and procured an assignment of an outstanding term of years to P. as his trustee. On the death of M., without republishing his will, a moiety of the fee descended to P.'s wife as a coparcener with others; but P., thinking himself entitled under the will, entered into, and took the profits of, the whole to his own use, and afterwards joined his wife in a feoffment and fine sur conusance de droit come ceo, and with proclamations.

The Court held, that a joint demise in ejectment cannot be supported as the several demises of one or more of the lessors whose title is proved at the trial; therefore, where the demise is by one parcener jointly with another parcener and her husband, whose title, jure uxoris, is barred by fine and non claim, there cannot be a verdict for the plaintiff.

DOE *d.* POOLE *v.* ERRINGTON, T. T. 1834. K. B. 3 *N. & M.* 646.

If a declaration allege a joint demise, and the evidence proves them to be tenants in common, the declaration cannot be supported.

EJECTMENT by tenants in common. On the trial it was objected, that a joint demise by them could not be sustained; and of this opinion was *Taunton*, J., before whom the cause was tried. He was applied to, to allow the record to be amended under the 3 & 4 Will. 4, c. 42; but he refused, and nonsuited the plaintiff. After a rule granted for setting aside the nonsuit—

Per Lord *Denman*, C. J.—At the time when this rule was moved for, I thought that the rule of law had been changed; but I find that it has not; and that which prevailed when the old writ of ejectio firmæ was in use is still in force; and there is reason for it, because all the titles of tenants in common are separate. You might, therefore, as well join several titles, where the interest is perfectly distinct, as those of tenants in common.

4. *Statement of the Entry*.*

5. *Statement of the Ouster†.*

(*c*) Of the notice to appear‡.

Doe *d.* Greene *v.* Roe, E. T. 1840. C. P. 8 *Scott*, 385.

A notice without date does not vitiate.

In an action of ejectment, the notice attached to the declaration contained no date.

The Court, however, held it good without date, as the delivery would be deemed the day.

Doe *d.* Gore *v.* Roe, M. T. 1834. B. C. 3 *D. P. C.* 5.

But the date in the notice cures the intitling of the declaration.

In ejectment, the irregularity complained of was, that the declaration was intitled of Trinity Term, 6 Will. 4, which was an impossible day, it not having as yet arrived. The notice at the foot of the declaration was dated correctly, 20th October, 1834.

Littledale, J.—I think the date in the notice at the foot of the declaration cures the defect in the intitling of it.

* It is not necessary to allege any time of entry. (See 2 Roll. Rep. 466; Latch, 199).

† The ouster should be stated to have been after the commencement of the supposed demise, and it is not unusual, though unnecessary, to mention a particular day. (See Cro. Jac. 311; Selw. N. P. 683, 4th ed.).

‡ If, from the conduct of the tenant and his wife, his Christian name cannot be stated in the notice at the foot of the declaration, it may be omitted. (*Doe* d. *Warne* v. *Roe*, E. T. 1834, B. C., 2 D. P. C. 517). So, a variation in the name of the notice subscribed of Thomas for John, the party served being told that he was the person intended, is immaterial. (*Doe* d. *Frost* v. *Roe*, E. T. 1825, B. C., 3 D. P. C. 563). And if the name of one tenant is improperly spelled in the notice served on another, it is immaterial for the service on the latter. (*Doe* d. *Messer* v. *Roe*, T. T. 1837, B. C., 5 D. P. C. 716). And in the notices attached to the declarations in ejectment, each tenant being rightly named in his own notice, is sufficient; and, therefore, an alteration in the name of a tenant in the notices served on the others is immaterial, it being sworn that the same person is meant. (*Doe* d. *Peach* v. *Roe*, T. T. 1837, C. P., 6 D. P. C. 62). But the notice at the foot of the declaration attached to the affidavit of service, where there are several tenants, must contain the names of the whole, and not that of each particular tenant only. (*Doe* d. *Ludford* v. *Roe*, E. T. 1840, B. C., 8 Dowl. P. C. 500). Where the notice at the foot was to appear in the K. B., which was at the time of serving the declaration:—Held, that it was not affected by the demise of the Crown, by which it became the Queen's Bench. (*Doe* d. *Davies* v. *Roe*, M. T. 1837, B. C., 6 D. P. C. 36). And where the notice was to the tenant to appear "next Easter Term;" it was dated 13th May, 1837; and the affidavit of service stated that the deponent had explained to the tenant in possession that the object of the service was to require him to appear in the next Trinity Term:—Held sufficient. (*Doe* d. *Symes* v. *Roe*, T. T. 1837, B. C., 5 D. P. C. 667). So, the notice, which was dated the 9th of May, required an appearance "next Easter Term." The literal meaning of that notice would be Easter, 1837; from the date, however, of the notice, the tenant must be aware that he would be required to appear in the following Trinity Term:—Held sufficient. (*Doe* d. *Watts* v. *Roe*, T. T. 1836, B. C., 5 D. P. C. 149). It is no objection that the notice to appear at the foot omitted the word "Term" after "Hilary." (*Doe* d. *Dimond* v. *Roe*, H. T. 1840, B. C., 8 D. P. C. 308). Where a declaration in ejectment is served with two notices annexed, one requiring the appearance of the defendant, and the other that he should enter into recognizances on his appearance, the latter may be treated as surplusage. (*Doe* d. *Roberts* v. *Roe*, H. T. 1837, C. P., 5 D. P. C. 508).

DOE *d.* ISHERWOOD *v.* ROE, M. T. 1833. K. B. 2 *N. & M.* 476; S. C 2 *D. P. C.* 420.

However, a notice to appear in due time is too general;

IN ejectment, the notice at the bottom of the declaration was, "to appear in due time," instead of "to appear in Michaelmas Term next."

Littledale, J.—The tenant in possession cannot be supposed to know what is the practice of the Court; and, therefore, directing him "to appear in due time" gave him no information.

LOCKLAND *v.* BADLAND, H. T. 1826. C. P. 7 *Moore*, 79.

and notice to appear in eight days of St. Hilary, instead of H. T., generally, bad.

IN ejectment, in the notice the tenant was required to appear in eight days of St. Hilary, instead of as of Hilary Term, generally.

The Court would not allow final judgment to be signed; but left the party to bring a fresh action, as the notice was irregular and void.

DOE *d.* DARWENT *v.* ROE, H. T. 1835. B. C. 3 *D. P. C.* 336.

The notice must state the consequences of not defending.

IN ejectment, the notice at the foot of a declaration in ejectment omitting to state that the consequence of the action not being defended will be turning the tenant out of possession—

Patteson, J.—I think the notice is not sufficient, as the consequence of the action not being defended is not sufficiently pointed out.

DOE *d.* ——— *v.* ROE, E. T. 1838. C. P. 6 *D. P. C.* 629.

The omission of the Christian name of one of several tenants in the notice, no ground for refusing judgment*.

ON motion for judgment against the casual ejector, the irregularity in the case was, that, in the notice served on two of the tenants, the Christian name of one of the other tenants was omitted.

Tindal, C. J.—That is not material.

DOE *d.* MORRIS *v.* WILLIAMS, M. T. 1826. K. B. 6 *B. & C.* 41.

Where a party defends as landlord, and the notice to quit and declaration are served on a party in possession, it will be presumed that such party came in as assignee of the defendant;

IN ejectment, evidence was given to shew that the lessor of the plaintiff was owner of the premises in question, and that the defendant had been his tenant, and paid rent for them. In 1819, the defendant ceased to occupy the premises, and his son-in-law, Willings, became the occupier. From that time neither the defendant or Willings had paid any rent. Notice to quit was served upon Willings; and when the ejectment was served, the defendant entered into a rule to defend as landlord. For the defendant, it was objected, that he ought to have had notice to quit.

Bayley, J.—In *Doe* v. *Murlop*, (6 M. & S. 110), it was considered that where it is proved that A. is tenant, and that, upon his quitting the premises, B. takes possession, the latter may be presumed to have come in as assignee of A. In this case there was no evidence of payment of rent by Willings to Williams, or of any other fact tending to rebut that presumption.

* So, where all the tenants had been personally served:—Held immaterial, that, in the notices, two of them were named "Mrs. M., Mrs. G." (*Doe* d. *Smith*, v. *Roe*, E. T. 1838, C. P., 6 D. P. C. 629).

DOE *d.* BEARD *v.* ROE, T. T. 1835. Ex. 1 *M. & W.* 360.

IN an action of ejectment, it appeared that the notice of declaration was signed "A. B., agent for the plaintiff."

The Court held it sufficient, and it need not go on to state the purposes specified in the act for which he is to appear.

but need not state the purposes for which the defendant is required to appear.

(*d*) AS TO THE SERVICE.

1. *Of Rule H. T.* 4 *Will.* 4.

DOE *v.* WILLIAMS, M. T. 1834. K. B. 4 *N. & M.* 259.

THE declaration having been served on the defendants, with notice to appear on the first day of last Easter Term, judgment was signed against the casual ejector in that term, and the time for appearing and pleading expired on the 12th of May, when, no appearance having been filed at the filacer's office, common appearances were filed according to the statute, and judgment signed as for want of a plea. No plea had been delivered, but the defendant had entered a plea, and filed the consent rules, in the chambers of the Lord Chief Justice. On the 12th of May, writs of hab. fac. poss. were issued and duly executed, and the lessor of the plaintiff put into possession. On the 5th of June, on its being urged before Mr. Justice *Patteson*, that, according to the R. G., H. T. 4 Will. 4, the plea ought to have been delivered between the parties, his lordship thought that the Rule 1. was not intended to apply to cases of ejectment.

And the Court held, that the first Rule, (Reg. Gen., Hil. T., 4 Will. 4), which requires that pleadings should be delivered between the parties, does not apply to actions of ejectment, it having been usual, before those Rules were made, to file them at the Judge's chambers, and not with any officer of the Court.

The Rule, H. T. 4 Will. 4, requiring pleadings to be delivered, does not apply to ejectments.

---

2. *At what Time.*

DOE *d.* BRENT *v.* ROE, T. T. 1831. Ex. 1 *C. & J.* 483; S. C. 1 *Tyrw.* 499.

THE declaration was served May 19th. By the statute 1 Will. 4, c. 70, Trinity Term is to commence on the 22nd May, which was Sunday.

Bayley, B.—Sunday, the 22nd May, is the first day of term, and although the Court does not sit upon that day, the essoign is regulated by that day. The 19th day would, therefore, be the essoign, and, consequently, the service is too late.

The Court said, that the practice had been uniform in all the Courts, and that, whether the proceedings were by original or bill, the declaration must be served before the essoign day.

With respect to the service of the declaration, there is no difference between proceeding by bill or original, since the 1 Will. 4, c. 70.

REG. GEN. T. T., 1 *Will.* 4, K. B., C. P., and Ex.

BY this Rule, it is ordered, that declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff

A declaration may be served

before first day of full term*.

shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoign or first general return-day.

---

3. *On whom.*

1*st. In general.*

1. *Of the general Rule.*

DOE *v.* ROE, T. T. 1831. Ex. 2 *Tyrw.* 280.

The notice must be served on the party to whom addressed†.

IN ejectment, the service of the declaration was on B., and the notice was addressed to A.—

The Court held it irregular, and not cured by the words "tenant in possession."

DOE *d.* FOLKES *v.* ROE, T. T. 1834. B. C. 2 *D. P. C.* 567.

If the notice be regularly served, it is not material that there is a substitution of Christian names.

IN ejectment, the service was perfectly regular on the tenant in possession on the premises, but in the tenant's name in the notice the name of "Jacob" was substituted for that of "Sarah."

Patteson, J.—That is sufficient.

---

2. *Upon the Tenant himself.*

DOE *d.* DANIEL *v.* WOODROFFE, T. T. 1839. Ex. 7 *D. P. C.* 494.

Personal service on tenant, though resident abroad, suffices‡.

IN ejectment, it appeared that one of the defendants resided in Boulogne, in France, and had been personally served there with a copy of the declaration. It was submitted that, as the service was personal, it was sufficient.

Per Cur.—We think the service sufficient.

---

3. *Upon the Wife.*

DOE *v.* ROE, T. T. 1833. B. C. 2 *D. P. C.* 199.

If the notice be served on the

THE affidavit stated a service on the wife on the premises, and that the person serving it had read over the notice, but did not

* Where the right of entry accrues to a landlord in or after Hilary or Trinity Term, he may, (under 11 Geo. 4 & 1 Will. 4, c. 70, s. 36), at any time within ten days afterwards, serve a declaration in ejectment specially intitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant in possession to appear and plead thereto within ten days. This is confined to issuable terms only. (*Doe* v. *Roe*, M. T. 1831, Ex., 2 C. & J. 45. See the former practice, Tidd, 1210).

† The service should be shewn on the "tenant in possession:" a service on the last person in possession is insufficient, although there may be a difficulty in ascertaining who is the tenant in possession. (*Doe* d. *Fraser* v. *Roe*, 5 D. P. C. 720).

‡ Service off the premises on the tenant allowed, when shewn that the access to them was prevented. (*Doe* d. *Barrow* v. *Roe*, 1 Sc. N. S., C. P. 25).

go on to state that he had explained it. The case of *Doe* v. *Roe*, (1 D. P. C. 428), was relied on, in which Mr. Justice *Patteson* had decided, that reading over the declaration without explanation would suffice.

wife it must be explained*;

Patteson, J.—I think I went too far in the case cited.

DOE *d.* WILLIAMS *v.* ROE, T. T. 1833. Ex. 2 *D. P. C.* 89.

THE service was stated to be on the wife, without stating it to have been "on the premises," or that she lived with her husband.

and served on the premises.

Bayley, B.—That will not do.

DOE *d.* WALKER *v.* ROE, H. T. 1830. C. P. 4 *M. & P.* 11.

ON motion, that the service of the declaration and notice in this case might be deemed good service. The service was upon a woman who represented herself to be the wife of the tenant in possession upon the premises.

And if the party represents herself to be the wife of the tenant, sufficient.

Mr. Justice *Gaselee*, (the only Judge in Court), held this service to be sufficient.

DOE *d.* POTTER *v.* ROE, T. T. 1835. C. P. 2 *Scott*, 378.

IN ejectment. On motion for judgment against the casual ejector, it appeared from the affidavit, that notice had been served upon the wife of the tenant on the premises, who, at the time informed the party serving, that her husband was in America, the son conducting the business.

So, service upon the wife, the husband being in America, but the son conducting the business, suffices for a rule nisi.

Held sufficient for a rule nisi.

DOE *d.* HARRISON *v.* ROE, T. T. 1821. Ex. 10 *Price*, 30.

IN ejectment. On motion for judgment against the casual ejector, the affidavit of service stated, that the notice had been left with the wife of the tenant in possession, the husband having absconded.

But, where the husband had absconded, it was held insufficient.

The Court held the same to be insufficient.

* Service on the wife at the dwelling of the tenant, (not the premises in question), if it appear that she is living with her husband at the time, (*Doe* d. *Boullott* v. *Roe*, T. T. 1837, Ex., 7 D. P. C. 463), or at the husband's residence:—Held sufficient. (*Doe* d. *Wingfield* v. *Roe*, H. T. 1833, B. C., 1 D. P. C. 693). But, it must be shewn she was living with her husband. (*Doe* d. *Mingay* v. *Roe*, M. T. 1837, C. P., 6 D. P. C. 182). So, in ejectment to recover possession of stables, service on the wife of the tenant at his dwelling-house is sufficient. (*Doe* d. *Graef* v. *Roe*, H. T. 1838, C. P., 6 D. P. C. 456). And, service on the wife, although she refused taking it, and left on the premises, held sufficient for a rule nisi. (*Doe* d. *Nash* v. *Roe*, 8 D. P. C. 305). So, service on the wife held sufficient although not explained, she refusing to be informed of it. (*Doe* d. *George* v. *Roe*, 3 D. P. C. 541; *Doe* d. *Frith* v. *Roe*, 3 D. P. C. 569). Service on the wife of the tenant in a shed, where the husband carried on business, sought to be recovered:—Held sufficient. (*Doe* v. *Roe*, 1 D. P. C. 67). So, service on the premises on a party representing herself the wife, living and reputed to be such, sufficient for the rule nisi. (*Doe* d. *Bremner* v. *Roe*, 8 D. P. C. 135).

4. *Upon the Mother* or Sister.*

DOE *d.* TIBBS *v.* ROE, H. T. 1835. C. P. 3 *D. P. C.* 380.

Service on the sister is not sufficient unless agency be shewn.

THE declaration had been delivered to the sister of the tenant, who said she would accept it on behalf of her sister.

Per Cur.—What the sister said does not carry the case a step further than if the declaration had been served upon her, unless it be also shewn that she had an authority from the tenant to act for her on other occasions.

---

5. *Upon the Son.*

DOE *d.* MARSHALL *v.* ROE, H. T. 1835. K. B. 4 *N. & M.* 553.

Service on the son, which the tenant acknowledges, without saying when, is not sufficient†.

A DECLARATION in ejectment was served upon the son of the tenant in possession before the first day of term, and the latter afterwards acknowledged that he had received the declaration.

The Court held the acknowledgment not sufficient to entitle the plaintiff to a rule for judgment against the casual ejector, unless it appear thereby that the declaration came to the hands of the tenant before the first day of term.

---

6. *Upon the Daughter.*

DOE *v.* ROE, M. T. 1833. B. C. 2 *D. P. C.* 414.

And it must be shewn that the daughter delivered it or explained it to the tenant;

THE affidavit stated, that the copy of the declaration had been served on the daughter of the tenant in possession on the premises, and that it had been read over and explained to her. The affidavit did not state that she had delivered or explained it to her father, nor any thing to shew that he had been apprised of it.

Littledale, J.—That will not do.

* Service on the mother of the tenant on the premises held insufficient. (*Doe* d. *Smith* v. *Roe*, M. T. 1832, Ex., 1 D. P. C. 614).

† But, where served on the son on the premises, and he afterwards stated that his father had received it, rule nisi granted. (*Doe* d. *Timmins* v. *Roe*, 6 D. P. C. 965). So, service on the son on the premises, the tenant clearly keeping out of the way to avoid service:—Held, sufficient for the rule nisi. (*Doe* d. *Luff* v. *Roe*, 3 Dowl. P. C. 575). But, in another case, service on the son held insufficient; and the declarations of the wife, as to the husband keeping out of the way, inadmissible. (*Doe* d. *Wilson* v. *Smith*, 3 Dowl. P. C. 379).

The deponent stated, that he had gone to the premises in question, where he found the son; to him he explained the nature of the declaration, and left a copy of it with him. The son stated that his father was not at home, and would not return before midnight. He called the next day, and saw the wife of the tenant in possession; on inquiring of her about her husband, she stated that he had gone out, but she did not know where:—Held sufficient. (*Doe* d. *Wetherell* v. *Roe*, M. T. 1833, B. C., 2 D. P. C. 441). So, service upon the son, upon an affidavit that the father was in the house at the time, allowed good; the counter affidavits not negativing that it did not come to the father before the first day of Hilary Term. (*Doe* d. *Protheroe* v. *Roe*, 4 D. P. C. 385).

DOE *d.* BRITTLEBANK *v.* ROE, T. T. 1833. C. P. 4 *M. & Scott*, 562.

IN ejectment, on motion for judgment against the casual ejector, the affidavit stated service upon the daughter of the tenant upon the premises, but it not appearing that it had ever come to the tenant's hands— and that it came to his hands*.

The Court held the service insufficient.

---

7. Upon the Nephew or Niece†.

---

8. Upon the Servant.

DOE *d.* READ *v.* ROE, E. T. 1836. Ex. 5 *D. P. C.* 85; S. C. 1 *M. & W.* 633; S. C. 1 *T. & G.* 846.

THE declaration in ejectment was delivered to a servant of the tenant of the premises, who was left in the care and direction of the premises. The Court refused a rule nisi for judgment against the casual ejector. Service on a servant is not sufficient, unless authorized to receive papers, &c.‡;

Lord *Abinger*, C. B.—This is not enough. You must go further, and shew that she has authority to receive papers and letters for the tenant.—Rule refused.

* Where the tenant was in a lunatic asylum, the Court held that service on the daughter was not sufficient. (*Doe* d. *Main* v. *Roe*, H. T. 1838, B. C., 6 D. P. C. 270). So, service on the daughter on the premises where the tenant was bedridden, and the declaration said to have been delivered:—Held sufficient for a rule nisi. (*Doe* d. *Frost* v. *Roe*, H. T. 1840, B. C., 8 D. P. C. 301). So, where the service was on the daughter-in-law on the premises, and she afterwards stated she had given it to the tenant, who said he would instruct his attorney:—Held enough for the rule nisi. (*Doe* d. *Sykes* v. *Roe*, E. T. 1839, C. P., 7 Scott, 121). Service, before the term, on the daughter on the premises, and acknowledgment by the wife, also before the term, that it had been given to the husband:—Held sufficient for the rule nisi. (*Doe* d. *Chaffey* v. *Roe*, H. T., 1840, B. C., 9 D. P. C. 100). But, in a prior case, service on the daughter on the premises was held insufficient, even for a rule nisi; although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served. (*Doe* d. *George* v. *Roe*, M. T. 1834, B. C., 3 D. P. C. 9). But service on the daughter, to whom it was explained, and her father being ill in bed, she took it up to him, and, on coming down, she said she had explained it to him:—Held good. (*Doe* d. *Cockburn* v. *Roe*, H. T. 1833, Ex., 1 D. P. C. 692). So, service upon the tenant's daughter before, and an acknowledgment by the tenant within the term:—Held sufficient. (*Roe* v. *Roe*, T. T. 1835, Ex., 4 D. P. C. 265). So, where, after service on the daughter of the tenant, at his residence, he afterwards called on the attorney, and said the time was coming when something must be done:—Held sufficient for the rule for judgment. (*Doe* d. *Agar* v. *Roe*, E. T., 1838, 6 Dowl. P. C. 624).

† Service on the niece, who had delivered the notice, &c., to the tenant, her aunt, who was ill:—Held sufficient. (*Doe* d. *Eaton* v. *Roe*, H. T. 1839, C. P., 7 Scott, 124).

‡ Where the tenant was abroad, and it was uncertain when he would return, service on a servant on the premises held sufficient for a rule nisi. (*Doe* d. *Mather* v. *Roe*, E. T. 1837, B. C., 5 D. P. C. 552; S. P. *Doe* d. *Morpeth* v. *Roe*, E. T. 1835, B. C., 3 D. P. C. 577; S. P. *Doe* d. *Treat* v. *Roe*, M. T. 1835, B. C., 4 D. P. C. 278). So, service on the premises on an agent of the tenant, who had ab-

DOE *d.* LORD DINORBEN *v.* ROE, E. T. 1836. Ex. 2 *M. & W.* 374.

or acknowledged before the term;

IN ejectment, on motion for judgment against casual ejector, the affidavit stated service on a servant of a tenant on the premises, without any acknowledgment of his having received it before the term—

The Court held the service insufficient, even for a rule nisi.

DOE *d.* DARRANT *v.* ROE, T. T. 1840. C. P. 8 *Scott*, 459.

but it need not be shewn when.

IN ejectment, the service was on the servant of the tenant.

The Court held, that it was sufficient if the affidavit shewed an acknowledgment by the tenant, that the declaration and notice came to his hands before the term, without shewing when such acknowledgment was made.

DOE *v.* ROE, M. T. 1832. C. P. 1 *M. & Scott*, 435.

Service on a servant on the premises, in absence of the master, insufficient, unless sworn that the master could not be found.

IN ejectment. Motion for judgment against the casual ejector. The affidavit stated service on a servant on the premises in the absence of the master.

The Court held the service insufficient, although sworn that the servant had stated that he had delivered the declaration and notice to his master.

DOE *d.* TUCKER *v.* ROE, H. T. 1834. C. P. 2 *D. P. C.* 775; S. C. 4 *M. & Scott*, 165.

So, service on the servant, admitted by the wife that she had given it to her husband:—Held insufficient.

IN ejectment. On motion for judgment against the casual ejector, the affidavit stated service on a servant; and admitted by the wife of the tenant that she had received it, and given it to her husband:—Held insufficient, the wife not being an agent for the purpose of making admissions.

sconded to America:—Held sufficient for a rule nisi. (*Doe* d. *Robinson* v. *Roe*, M. T. 1834, B. C., 3 Dowl. P. C. 11). In general, where the service is on a servant on the premises, there should be an affidavit by the servant, or it should be otherwise shewn, that it came to the hands of the tenant. (*Doe* d. *Pugh* v. *Roe*, 1 Scott, 464). Service on the bailiff of the tenant upon the premises, it appearing to have come to the hands of the tenant's attorney, who said he would appear for him:—Held sufficient. (*Tenny* v. *Cutts*, 1 Scott, 52). But where the premises underlet to tenants were found unoccupied only recently before the application, and the inquiry had been made only as to the lessee, and the declaration left with his servant, not on the premises, the Court refused to give judgment. (*Doe* d. *Burrows* v. *Roe*, M. T. 1838, B. C., 7 D. P. C. 326). Where, after service on a servant on the premises, the declaration was seen the same day in the hands of the defendant's attorney:—Held sufficient. (*Doe* v. *Roe*, 2 Dowl. P. C. 184). So, where the party having explained it to the tenant, left it in a chair, and the latter refused to take any paper, and left the room. (*Doe* d. *Visger* v. *Roe*, 2 Dowl. P. C. 449). But where it was not left upon the tenant's refusal, a rule nisi only granted. (*Doe* d. *Forbes* v. *Roe*, 2 Dowl. P. C. 452). In ejectment for a close of land, proof of service of a copy of the declaration and notice, at the house of the tenant in possession, on a female, who, on the papers being explained to her, says she knows what they are, for that the lessor of the plaintiff had already been endeavouring to effect service, but could not, and, by sticking another copy on the door of the house, is sufficient for a rule nisi for judgment against the casual ejector. (*Doe* d. *Wright* v. *Roe*, H. T. 1838, C. P., 6 D. P. C. 455).

9. Upon Occupiers as contradistinguished from Tenants.

ROE *d.* BLAIR *v.* STREET, M. T. 1834. K. B. 2 *Ad. & E.* 329; S. C. 4 *N. & M.* 42.

Where there is an underletting, the service should be on the actual occupier,

IN ejectment, it appeared that one of two defendants was undertenant to the other, who was tenant under a third party, who had been let into possession, upon a contract of sale not executed.

The Court held, that it was sufficient to give notice to the actual occupiers; but that service on the wife of the former, not upon the premises, was not sufficient to entitle the plaintiff to execution as to those premises; and refused to amend the postea from the Judge's notes.

DOE *d.* LORD DARLINGTON *v.* COCK, E. T. 1825. K. B. 4 *B. & C.* 259.

or undertenants, and not on the original lessee.

IN an action of ejectment for premises which had been demised on lease to one person, who had underlet to others.

The Court held it to be necessary to serve all the undertenants with a copy of the declaration as well as the original lessee.

DOE *d.* SCOTT *v.* ROE, H. T. 1840. C. P. 6 *Bing. N. C.* 207; S. C. 8 *D. P. C.* 254.

And service on party with whom off-going tenant has left key of premises suffices.

IN ejectment, it appeared that the tenant in possession had absconded, leaving the key of the house in the care of a broker, with directions that he should let the premises. A copy of the declaration had been served on the broker, and another copy had been affixed to the door of the house.

The Court granted a rule absolute.

2nd.—*In Particular.*

1. Where there are several Tenants.*

2. Upon one who personates or represents the Tenant†.

3. Where Tenant resists Service or refuses to be seen.

DOE *d.* ROSS *v.* ROE, M. T. 1839. C. P. 7 *Scott*, 866.

Where service is prevented by

ON motion for judgment against the casual ejector—

The Court held, that where the service in the usual way was pre-

* Service of declaration on one of two tenants, both for himself and his co-tenant, will not suffice, (*Doe* d. *Elwood* v. *Roe*, T. T. 1819, C. P., 3 Moore, 578), unless they appear, by affidavit, to have been all in possession, (*Doe* d. *Bromley* v. *Roe*, H. T. 1819, K. B., 1 Chit. Rep. 141), though Lord *Ellenborough* is reported to have held contrary; (*Right* d. —— v. *Wrong*, H. T. 1817, K. B., 2 Chit. Rep. 175); and *Bayley*, J., said, it only authorized a rule nisi for judgment against the casual ejector; (*Doe* d. *Field* v. *Roe*, T. T. 1815, K. B., 2 Chit. Rep. 174); but in another case the rule was made absolute. (*Doe* d. *Bailey* v. *Roe*, H. T. 1799, C. P., 1 B. & P. 369; S. P. *Anon.*, H. T. 1814, K. B., 2 Chit. Rep. 176).

† Evidence of defendants assuming the character of tenant in possession, and in that character accepting a declaration in ejectment, is insufficient for a jury to find that he actually was so, (*Doe* d. *James* v. *Stanton*, H. T. 1819, K. B., 2 B. & Ad. 371).

violent conduct of tenant, throwing declaration into house suffices*.

vented by the violent conduct of the tenant, and it was not read or explained, but thrown into the house, the rule for judgment allowed.

---

4. *Upon Administratrix and Executor*†.

---

5. *In case of Bankruptcy.*

DOE *d.* BARING *v.* ROE, H. T. 1838. C. P. 6 *D. P. C.* 456.

In case of bankruptcy service on the messenger and official assignee is sufficient.

THE affidavit stated, that the deponent had gone on the 6th of January to the premises for the purpose of serving the tenant, and that he personally served an individual who represented himself to be in possession under a fiat of bankruptcy issued against George Sandys Heywood. The deponent also subsequently personally served George Gibson, the official assignee.

Tindal, C. J.—It seems reasonable, I think, that the rule should be granted.—Rule accordingly.

* The deponent, endeavouring to effect the service, had gone to the premises in question, but found the door closed; he knocked but gained no admission; he looked through the window and explained the nature of the service, and pasted the declaration against the door, and came away. Two conversations afterwards took place between the deponent and the attorney of the tenant, from which it appeared that the declaration had been brought to that attorney:—Held, sufficient. (*Doe* d. *Mortlake* v. *Roe*, H. T. 1834, B. C., 2 D. P. C. 444). It was sworn that the tenant was keeping out of the way to avoid service. The deponent went to the house sought to be recovered, and having been informed that the tenant was at home, he put a ladder against the drawing-room window and got up to it. While there, believing that the tenant was in the room, he explained at the window the nature of the proceeding; and a copy was stuck up on the door:—Held, sufficient. (*Doe* d. *Colson* v. *Roe*, T. T. 1838, C. P., 6 D. P. C. 765). Where, the tenant refusing to open the door, the notice was read and explained through the door, and afterwards delivered to the son on the premises:—Held sufficient for a rule nisi. (*Doe* d. *Grimes* v. *Rowe*, 4 D. P. C. 591). Where there is reason to believe that the person served is the tenant in possession, although he denies it, the Court will allow judgment to be signed. (*Doe* d. *Hunter* v. *Roe*, E. T. 1837, B. C., 5 D. P. C. 553). If the tenant shuts himself in and refuses to receive the notice, it may be put under the door. (*Doe* d. *Lord Summers* v. *Roe*, E. T. 1837, B. C., 5 D. P. C. 552). The affidavit stated, that inquiry had been made for Cook, one of the tenants on the premises, and it was found that he and his wife and children had left the premises as it was understood to embark for America; that the wife and children had actually embarked, and it was believed that Cook had wholly quitted the premises, and did not intend to return. The declaration had been affixed on the door of Cook's house on the premises, and had also been delivered and read over and explained to a person on the premises who was servant to one of the tenants of other part of the premises. The affidavit did not state that Cook had left the premises to avoid being served with the declaration:—Held, sufficient. (*Doe* d. *Osbaldiston* v. *Roe*, T. T. 1832, B. C., 1 D. P. C. 456).

† Service on the administratrix of the tenant last in possession, she not residing on the premises, and it not appearing by the affidavit what was the interest of the late tenant, nor describing the party as administratrix:—Held, insufficient. (*Doe* d. *Rigby* v. *Roe*, T. T., 1835, B. C., 4 D. P. C. 14).

6. *In Ejectment for Chapels.*

DOE *d.* KERSCHNER *v.* ROE, M. T. 1838. C. P. 7 *D. P. C.* 97.

IN ejectment, to recover possession of a dissenting chapel, service had been effected on the surviving lessees and the sextoness.

The Court granted a rule.

For dissenting chapel, service on the lessee and sexton sufficient*.

---

7. *Connected with Companies*†.

8. *As to Foreigners*‡.

---

9. *As to Joint-Tenants.*

DOE *d.* CLOTHIER *v.* ROE, H. T. 1838. B. C. 6 *D. P. C.* 291.

THE premises were in possession of two joint-tenants. Service had been effected on one of them as the other could not be found.

Patteson, J.—That is sufficient. Service on one of several joint-tenants is sufficient.

It is sufficient to serve one of several joint-tenants§,

DOE *v.* ROE, H. T. 1832. Ex. 3 *Tyrw.* 84.

IN an action of ejectment—

The Court held, that service on one of two joint-tenants in possession is sufficient, but the joint-tenancy must appear on the affidavit.

in possession.

* So, where the tenant in possession was abroad, service on the party who had the keys of the chapel, or the wife of the tenant and his servant—a rule absolute for judgment in the first instance. (*Doe* d. *Dickins* v. *Roe*, M. T. 1838, C. P., 7 D. P. C. 121). Service on the trustees of a dissenting chapel, and affixing a copy on the edifice itself, suffices. (*Doe* d. *Gray* v. *Roe*, T. T. 1839, B. C., 7 D. P. C. 700). So, with respect to a chapel and school. (*Doe* d. *Smith* v. *Roe*, E. T. 1840, B. C., 8 D. P. C. 509). Service on the schoolmaster and on the person who paid the rates of a dissenting chapel and school:—Held, sufficient for a rule nisi. (*Doe* d. *Lord Somers* v. *Roe*, 8 D. P. C. 292).

† Service of a declaration in ejectment on the clerk of an incorporated company, (not empowered to sue and be sued in the name of their clerk), on a portion of the premises, but who was not resident there, is sufficient for a rule nisi. (*Doe* d. *Ross* v. *Roe*, T. T. 1836, B. C., 5 D. P. C. 147). So, service of a declaration in ejectment on the book-keeper of a company in possession of part of the premises:—Sufficient. (*Doe* v. *Roe*, H. T. 1831, B. C., 1 D. P. C. 23). So, service on the secretary of the East India Company in respect of premises in their possession:—Held proper. (*Doe* d. *Coopers' Company* v. *Roe*, M. T. 1839, B. C., 8 D. P. C. 134). And service of a declaration in ejectment upon a Railway Company according to the mode prescribed in their act, is absolute in the first instance. (*Doe* d. *Bromley* v. *Roe*, M. T. 1840, Ex., 8 D. P. C. 858). But service on clerk of commissioners in whom land is vested, not sufficient. (*Doe* d. *White* v. *Roe*, M. T. 1839, C. P., 8 D. P. C. 71).

‡ Where one tenant, a Welchman, could not speak English, and the party serving obliged to employ an interpreter to explain the declaration, but who was not sworn:—Held, that it being sworn to a belief of his having understood it, was sufficient. (*Doe* d. *Probert* v. *Roe*, H. T. 1835, B. C., 3 D. P. C. 335).

§ But where there were two tenants, service of the declaration directed to one on the wife of the other on the premises:—Held insufficient. (*Doe* d. *Smith* v. *Roe*, M. T. 1836, B. C., 5 D. P. C. 254). So, where a surviving joint-tenant, who is the sole person in possession, has been served, the Court will not allow judgment to be signed against him, although the name of the deceased joint-tenant has been introduced into the proceedings. (*Doe* d. *Hewson* v. *Roe*, H. T. 1836, B. C., 5 D. P. C. 404).

DOE *d.* WILLIAMSON *v.* ROE, T. T. 1827. C. P. 10 *Moore*, 493.

But the notice must be addressed to each.

IN an action of ejectment. On motion for judgment against the casual ejector—

The Court held, that, in case of joint-tenancy, service on one will be good service on both; but where the notice was addressed to one only, it was held insufficient.

DOE *d.* HUTCHINSON *v.* ROE, M. T. 1833. B. C. 2 *D. P. C.* 418.

And service on the tenant of a joint-tenant, who had underlet, is sufficient.

IN ejectment, it appeared that the service was regular, except as to one of the tenants, who was joint-tenant with one who had underlet, and whose tenant had been regularly served. It was stated that, in *Doe* d. *John Bailey*, (1 B. & P. 369), it was held, that service of a declaration in ejectment on one of two tenants in possession was good service on both.

The Court held the service sufficient.

---

10. *As to Mortgagees*.*

11. *As to Overseers†.*

---

12. *As to Prisoners.*

DOE *d.* HARRIS *v.* ROE, T. T. 1834. B. C. 2 *D. P. C.* 607.

Leaving the declaration with the turnkey of a prison is sufficient if it be acknowledged‡.

IN ejectment, it appeared that the service had been by leaving the declaration with the turnkey of the prison in which the tenant in possession was confined, with directions to him to give it to him; and the tenant had acknowledged that he had received it before the first day of the term.

Patteson, J.—That will do.

---

4. *Where the Possession is vacant.* See post, Div. *Relative to Ejectment on a vacant Possession, and no Distress.*

5. *Off the Premises*§.

6. *As to being good for Part and bad as to the Residue*‖.

* Service of declaration in ejectment on a person described as mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, is not sufficient without an acknowledgment by the mortgagee. (*Doe* d. *Collins* v. *Roe*, M. T. 1832, B. C., 1 D. P. C. 613).

† Where property in possession of parish overseers is sought to be recovered in ejectment, service on one is not sufficient to obtain judgment against all. (*Doe* d. *Weeks* v. *Roe*, H. T. 1836, B. C., 5 D. P. C. 405).

‡ Declaration being pushed through an iron grating in Newgate:—Held good service. (*Wright* d. *Bayley* v. *Wrong*, H. T. 1817, K. B., 2 Chit. Rep. 185).

§ Formerly, the service of a declaration off the premises, or not at the tenant's actual dwelling, was confined to a personal service. (See Adams, Ejectment, 207. But see ante, p. 527).

‖ Service being bad as to some defendants will not affect proceedings against the others. (*Doe* d. *Murphy* v. *Moore*, T. T. 1814, K. B., 2 Chit. Rep. 176). So, when the service is good for part and bad for part, the lessor may recover those premises for which the service is good. (See Adams, Ejectment, 213).

7. *As to the Explanation and Acknowledgment thereof**. See also ante, Div. *As to the Service*, (*d*), p. 525, &c. &c.

DOE *v.* ROE, T. T. 1826. K. B. 5 *B. & C.* 764; S. C. 8 *D. & R.* 342.

A DECLARATION in ejectment was left at the house of the tenant in possession on Saturday, and the tenant afterwards acknowledged that he received it on the following Sunday, (which was before the essoign-day).

An admission by the tenant that he had received the declaration on a *Sunday* is of no avail†.

Per Cur.—Service of the declaration on a Sunday by the lessor of the plaintiff upon the tenant in possession would not be good service, and the same rule applies to an acknowledgment.

---

8. *Affidavit of.*

DOE *d.* COUSINS *v.* ROE, M. T. 1838. Ex. 4 *M. & W.* 68; S. C. 7 *D. P. C.* 53.

AFFIDAVIT of service was intitled "*Doe* d. *Cousins* v. *Roe*." The declaration was on several demises. It was submitted, that the affidavit was sufficient, as the plaintiff was *John Doe*, and the lessors were no parties to the action.

Affidavit, as on one demise, bad, if there appear to be several demises‡.

* No explanation is required where the interested party says he understands the contents of the declaration. (*Anon.*, E. T. 1815, K. B., 2 Chit. Rep. 184). The explanation to the tenant must be previous to the first day of term. (*Doe* v. *Roe*, T. T. 1802, K. B., 1 D. & R. 563; S. P. *Doe* d. *Tindale* v. *Roe*, T. T. 1815, K. B., 2 Chit. Rep. 180).

† The husband is not bound by the mere acknowledgment of his wife that he has received a declaration in ejectment; (*Goodtitle* d. *Read* v. *Badtitle*, H. T. 1799, C. P., 1 B. & P. 384); though, in another case, a rule nisi was granted. (*Anon.*, M. T. 1815, K. B., 2 Chit. Rep. 182). And also where defendant's attorney acknowledged receipt of declaration from his client, a rule nisi was granted; (*Anon.*, T. T. 1813, K. B., 2 Chit. Rep. 187); but an acknowledgment by the tenant on a Sunday is insufficient. (*Goodtitle* d. *Mortimer* v. *Notitle*, M. T. 1822, K. B., 2 D. & R. 232).

An acknowledgment by a tenant in possession, after the commencement of the term, that the declaration has come to his hands, is not sufficient even for a rule nisi for judgment against the casual ejector, unless the acknowledgment is that he received it before term, although the wife acknowledges that it came to her hands on the day before term. (*Doe* d. *Finch* v. *Roe*, M. T. 1836, B. C., 5 D. P. C. 225).

‡ The affidavit stated the service to have been on the "occupier," instead of the tenant in possession:—Held insufficient. (*Doe* d. *Jackson* v. *Roe*, H. T. 1836, B. C., 4 D. P. C. 609). So, upon the person in possession, is insufficient. (*Doe* d. *Oldham* v. *Roe*, H. T. 1836, Ex., 4 D. P. C. 714). So, an affidavit of service in ejectment, omitting the year, insufficient. (*Doe* d. *Foster* v. *Roe*, T. T. 1840, Ex., 8 D. P. C. 784). It is sufficient if the affidavit stated that the notice and declaration were explained, without reading them over. (*Doe* v. *Roe*, 1 Dowl., K. B., 427). So, it is sufficient if the tenant reads the declaration and notice, and says he understands it. (*Doe* d. *Jones* v. *Roe*, 1 Dowl. P. C. 518). Reading over and explaining to one of two parties jointly in possession, in the presence of the other, held sufficient service. (*Doe* d. *Jordan* v. *Roe*, 4 Dowl. P. C. 577). Rule for judgment nisi allowed upon an affidavit, stating that the tenant appeared to understand the intent of the declaration, not going on to allege that it was read or explained. (*Doe* d. *Downes* v. *Roe*, 4 Dowl. P. C. 565). In order to obtain judgment against the casual ejector, it is necessary to swear to a service on

Per Cur.—It is a misdescription of the action. It ought to have been "*Doe* on the several demises."

DOE *d.* JENKS *v.* ROE, E. T. 1833. Ex. 2 *D. P. C.* 55; S. C. 3 *Tyrw.* 602.

If the declaration describes the lessors of the plaintiff as executors, an affidavit of service omitting the words "as executors," is sufficient.

IN ejectment. There were three demises in the declaration, one by two persons described as executors, another by persons described as assignees, and a third generally. In the title of the affidavit, the plaintiff was described as "Doe on the demise of Jenks and others," without stating them to be executors, as they were described in the declaration.

The Court thought the affidavit sufficient.

DOE *v.* ROE, M. T. 1831. Ex. 2 *C. & J.* 45; S. C. 2 *Tyrw.* 158.

But, in another case, an affidavit of service "on the tenants in possession *as executors*," was held insufficient.

THE affidavit stated a service on A. B. and C. D., tenants in possession, as executors.

Bayley, B.—Why is it not said, "tenants in possession" merely? The rule is, that the tenants in possession must be served. Here are introduced certain qualifying words, which induce a doubt. On an indictment for perjury, it might be said that the possession of one was the possession of both. It is a qualification. The affidavit must be amended.

DOE *d.* LEVI *v.* ROE, M. T. 1838. C. P. 7 *D. P. C.* 102.

Affidavit, where more than one tenant, must shew each was served personally.

THE affidavit stated, that the deponent had "personally served J. T., W. E., J. E., and C. T., the four tenants in possession, with true copies of the declaration," and that the same had been read over and explained to them. The difficulty was, that it was not sworn specifically that each tenant had been personally served.

The Court held the affidavit not sufficient, but each should be sworn to have been personally served.

DOE *d.* HUNGATE *v.* ROE, H. T. 1836. K. B. 4 *Ad. & E.* 83, n.

Where no cause is shewn against the rule for service, the deponent must swear he believes the facts to be true.

IN an action of ejectment. On motion for judgment against the casual ejector—

The Court held, that where no cause is shewn against making a rule nisi absolute, the affidavit of service on a person at the dwelling-house, who afterwards stated that it had been delivered, must go on to allege that the deponent believes such statement to be true.

the "tenant in possession;" it is not sufficient to swear to service on a person who appears, from facts stated in the affidavit, to be, in point of law, the tenant in possession. (*Doe* d. *Jones* v. *Roe*, M. T. 1836, B. C., 5 D. P. C. 226). Where the affidavits stated that the deponent had "delivered the declaration to the wife on the premises," instead of served:—Held sufficient. (*Doe* d. *Jenkins* v. *Roe*, T. T. 1836, B. C., 5 D. P. C. 155). The affidavit stated, that the person endeavouring to effect the service had gone to the premises, and presented the declaration to the wife of the tenant in possession. She refused to take it, and the deponent then left it on a table in the house. He having explained the nature and object of the declaration, left the house, and the wife, taking up the declaration, threw it after him. He then picked it up, and affixed it upon the most conspicuous part of the premises. (*Doe* d. *Courthope* v. *Roe*, M. T. 1833, B. C., 2 D. P. C. 441). A joint affidavit of service on the housekeeper, on the premises, and by the latter that she had delivered it to the tenant:—Held sufficient for a rule nisi. (*Doe* v. *Roe*, T. T. 1833, B. C., 2 D. P. C. 198).

(*e*) As to the amendment of.

Doe *d.* Bishton *v.* Hughes, M. T. 1835. Ex. 2 *C., M. & R.* 281; S. C. 4 *D. P. C.* 412.

An amendment may be made at Nisi Prius*.

In ejectment against twelve defendants, they defended jointly, and entered into a joint consent-rule for part of the premises mentioned in the declaration, but not specifying particularly what part. At the assizes, two of the defendants were allowed, by order of the Judge, to suffer judgment by default, and that the record should be amended accordingly. This was opposed on the part of the plaintiffs; but *Bolland*, Baron, granted the application on payment of costs.

IX. RELATIVE TO EJECTMENTS UNDER THE 1 Geo. 4, c. 87.

(*a*) To what cases it extends.

The 1 Geo. 4, c. 87, enables landlords to recover more speedily possession of lands, &c., held over by tenants;

The 1 Geo. 4, c. 87, after reciting that the laws heretofore made for preventing the losses to which landlords are exposed by the unlawful holding over of lands and tenements by tenants, or persons claiming under them, after the expiration or legal determination of their terms or interest, have been found by experience insufficient, and it is therefore expedient to provide, in certain cases, a more expeditious mode for recovering the possession of lands and tenements so held over, enacts, "That, where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing, made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the Court in which the action shall have been commenced, on the first day of the term then next following, or if the action shall be brought in (Wales, or in the counties palatine of Chester), Lancaster, or Durham respectively, then on the first day of the next session or assizes, or at the court day, or other usual period for appearance to process then next following (as the case may be), there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as are hereinafter next specified; and upon the appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord producing the lease or

* If, on the trial of an ejectment, it appear that the parish is mis-stated in the declaration, the Judge will allow it to be amended under the stat. 3 & 4 Will. 4, c. 42, although the ejectment be for a forfeiture. (*Doe* v. *Edwards*, H. T. 1834, N. P., 6 C. & P. 208).

agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant of the term next preceding the time of trial, or if the action shall be brought (in Wales or) in the counties palatine respectively, then of the session, assizes, or court-day, (as the case may be), at which the trial shall be had, and also why he should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule, in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and find such bail with such conditions, and in such manner as shall be specified in the said rule, or such part of the same so made absolute, and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff."

Doe *d.* Tindal *v.* Roe, M. T. 1831. K. B. 1 *D. P. C.* 143; S. C. 2 *B. & Ad.* 922.

and only applies where the term has come to a natural end, or been extinguished by notice to quit*;

In ejectment to recover possession of a farm in Essex:—Amery Pratt, the tenant in possession, held under a lease from the lessor of the plaintiff, for a term which had not expired, but which had been surrendered by a trustee, to whom Pratt had assigned the lease, for the benefit of creditors. Upon this surrender being made, the lessor of the plaintiff demanded possession in writing, according to the terms of 1 Geo. 4, c. 87. The tenant refused to give up possession, on which the present ejectment was brought. The lessor of the plaintiff caused to be given the usual notice of motion under the above statute, to compel the tenant, in case he should seek to defend, to enter into the usual recognizances provided by the act. A rule to shew cause to that effect having been obtained—

The Court held, that the 1 Geo. 4, c. 87, requiring tenants holding over to give security and enter into recognizances, only applies to cases where the tenancy is under lease, and has expired by efflux of time, or under an agreement from year to year, if the tenancy has been determined by a regular notice to quit.

* In ejectment by landlord against tenant, if the title to the premises be disputed between them, the latter is not compellable to give the undertaking and enter into the recognizances required by 1 Geo. 4, c. 87, s. 1. (*Doe* d. *Sanders* v. *Roe*, M. T. 1830, B. C., 1 D. P. C. 4).

DOE *d.* PEMBERTON *v.* ROE, T. T. 1827. K. B. 7 *B.* & *C.* 2.

ON a rule to shew cause why the tenant in possession should not enter into recognizances under the 1 Geo. 4, c. 87. The question was, whether the case came within the meaning, for it certainly was not within the words of that statute. The words of the act were, whether the tenant held "for any term or number of years certain, or from year to year." Here the tenant held under a lease for lives, all of which had dropped.

The Court said they could not go beyond the words of the act.

therefore does not apply to a holding for years determinable on lives*.

(*b*) DECLARATION AND NOTICE TO APPEAR.

DOE *d.* HOLDER *v.* RUSHWORTH, T. T. 1838. Ex. 4 *M.* & *W.* 75; S. C. 6 *D. P. C.* 712.

THE notice at the foot of the declaration required the tenant to appear "in next Trinity Term" generally. Before the end of the term, he not having appeared, the usual rule nisi had been obtained, calling upon him to shew cause why, besides being admitted defendant, &c., he should not enter into the terms and conditions as set forth in the first section of the act.

The Court held, upon cause shewn against the rule, that the statute was not complied with, it requiring the notice to be, to appear on the first day of the term.

The notice must require the defendant to appear on the first day of the next term.

(*c*) OF THE AFFIDAVIT.

DOE *d.* PRYME *v.* ROE, H. T. 1840. B. C. 8 *D. P. C.* 340.

ON shewing cause against a rule under 1 Geo. 4, c. 87, requiring the tenant in possession to enter into the recognizance, and give the undertaking required by that statute, it was objected to the affidavit, that it was sworn before the attorney named in the declaration, which was contrary to the directions of Reg. Gen., H. T. 2 Will. 4, s. 6.

Per Patteson, J.—The objection is good; it appears on the face of the declaration, that the person before whom the affidavit was sworn is the attorney to the plaintiff, and the rule must consequently be discharged.

The affidavit in support of a motion for security under 1 Geo. 4, c. 87, cannot be sworn before the plaintiff's attorney†.

* So, a mere request is not an agreement within the 1 Geo. 4, c. 87. (*Rees* v. *Thorntons*, 1825, Ex., MSS.).

So, if a landlord allows his tenant to hold over above a year, without taking any step to recover the premises, he is not entitled to the benefit of the 1 Geo. 4, c. 87, s. 1. (*Doe* v. *Field*, T. T. 1834, B. C., 2 D. P. C. 542).

It is immaterial, in an application under the 1 Geo. 4, c. 87, s. 1, that the lessor of the plaintiff is the original lessee, and the tenant his sub-lessee. (*Doe* d. *Watts* v. *Roe*, M. T. 1836, B. C., 5 D. P. C. 213).

One of several tenants in common held entitled to apply under 1 Geo. 4, c. 87, s. 1, for the recognizance for costs; and it is not necessary that the lease should be proved by the affidavit of the attesting witness. (*Doe* d. *Morgan* v. *Rotheram*, E. T. 1835, Ex., 3 D. P. C. 690).

† The affidavit in support of a rule calling on a tenant to give the undertaking &c. mentioned in the 1 Geo. 4, c. 87, s. 1, should shew that the tenancy was de-

(*d*) Of the recognizance.

The 4th sect. of the 1 Geo. 4, c. 87, regulates the recognizance.

By the 1 Geo. 4, c. 87, s. 4, it is enacted, "That all recognizances and securities entered into pursuant to the provisions of this act may and shall be taken respectively in such manner, and by and before such persons, as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and that the officer of the same Court, with whom recognizances of bail are filed, shall file such recognizance and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

Roe *d.* Durant *v.* Moore, T. T. 1830. C. P. 6 *Bing.* 656; S. C. 4 *M. & P.* 531.

The recognizance is to be intitled in the cause the tenant as the defendant.

In ejectment, the tenant in possession, upon his being admitted to defend, besides entering into the common rule, and giving the common undertaking, in case the verdict should pass for the lessor of the plaintiff, to give him judgment of the term next preceding the trial, entered into recognizances required by the statute 1 Geo. 4, c. 87, s. 1, with two sureties, to pay the damages and costs, in pursuance of a rule to that effect obtained by the lessor of the plaintiff in the last term. The rule was intitled "*Roe* d. *Durant* v. *Doe*;" and the recognizance taken before commissioners in the country was intitled in like manner.

Per Cur.—The recognizance should not be intitled in the cause as it originally stood, but with the substitution of the name of the tenant for that of *John Doe.*

Doe *d.* Caulfield *v.* Roe, M. T. 1836. C. P. 5 *D. P. C.* 365; S. C. 3 *Bing. N. S.* 329.—S. P. Doe *d.* Holder *v.* Rushworth, T. T. 1838. Ex. 4 *M. & W.* 75; S. C. 6 *D. P. C.* 712.

The agreement or counterpart

Upon an affidavit in the terms prescribed by 1 Geo. 4, c. 87, s. 1, to which was annexed a copy of an agreement for a lease which

termined by a regular notice to quit. (*Doe* d. *Topping* v *Boast*, T. T. 1839, Ex., 7 D. P. C. 487).

And affidavit in support of the application must have the plaintiff's lessor's name in its title. (*Doe* d. *Watson* v. *Roe*, H. T. 1836, B. C., 5 D. P. C. 389).

The execution of the lease may be proved by the affidavit of a person who is not the attesting witness. (*Doe* d. *Gowland* v. *Roe*, M. T. 1837, B. C., 6 D. P. C. 35).

Where the attorney for the tenant was also the attesting witness to the lease:—Held, that he might be compelled to make the affidavit necessary to found the application for the landlord's rule, under 1 Geo. 4, c. 87, s. 1. (*Doe* d. *Avery* v. *Roe*, E. T. 1838, B. C., 6 D. P. C. 518).

had expired, a rule was obtained on the part of the landlord against the tenant under that statute. On shewing cause, a preliminary objection was taken, that the original agreement was unstamped at the time the rule was obtained, although it had been stamped previously to the day for shewing cause. It was contended that the production of a copy did not satisfy the terms of the statute, which required the landlord to produce "the lease or agreement, or some counterpart or duplicate thereof."

must be duly stamped before application can be made for bail.

Tindal, C. J.—This, as it appears to me, is a difficulty which cannot be surmounted. The lease or agreement upon which the landlord seeks to bring a party within this statute should, in my opinion, be a lease, valid, binding, and perfect in all its parts, at the time when the landlord makes his application to the Court. Now, it cannot be affirmed of an unstamped instrument that it is binding, valid, and perfect. With regard to the objection, that the motion should be made on the production of the original instrument or counterpart, as the statute is explicit, and entitles the landlord to move on "producing the lease or agreement, or some counterpart or duplicate thereof," I think that the copy is insufficient.

(*e*) Of the consent rule and judgment*.

By 1 Geo. 4, c. 87, s. 2, it is enacted, "That wherever hereafter it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of lease, entry, or ouster, but the production of the consent-rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry, and ouster, and the Judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the plaintiff, on the trial, after proof of his right, to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial finding for the plaintiff shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment."

The 2nd sect. of the 1 Geo. 4, c. 87, regulates the consent-rule and judgment.

* Where a landlord applies to the Court to compel his tenant to give the securities required by the 1 Geo. 4, c. 87, it may also be made part of the rule, that the landlord shall be at liberty to sign judgment against the casual ejector in case of a default on the part of the tenant to give the required securities. (*Doe* v. *Roe*, T. T. 1833, B. C., 2 D. P. C. 180).

(*f*) Of the execution.

Under sect. 3 of the 1 Geo. 4, c. 87, the Judge may stay execution.

By 1 Geo. 4, c. 87, s. 3, it is enacted, "That, in all cases in which such undertaking shall have been given, and security found as aforesaid, if, upon the trial, a verdict shall pass for the plaintiff, but it shall appear to the Judge, before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the Judge to order the execution of the judgment to be stayed absolutely till the fifth day of the term then next following, or till the next session, assizes, or court day, (as the case may be), which order the Judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that, within four days from the day of the trial, he shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above-mentioned shall immediately stand discharged and be of no effect in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound, with two sufficient sureties, unto the defendant in the same in such sum, and with such condition, as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment by an act passed in England in the sixteenth and seventeenth years of the reign of King Charles II., and by an act passed in Ireland in the seventeenth and eighteenth years of the reign of the same King, which acts are respectively intituled 'An Act to prevent Arrests of Judgment, and superseding Executions.'"

(*g*) Of the costs.

By s. 6, if the verdict be found for the defendant, who has given bail, the landlord shall pay double costs.

By 1 Geo. 4, c. 87, s. 6, it is enacted, "That, in all cases wherein the landlord shall elect to proceed in ejectment under the provisions hereinbefore contained, and the tenant shall have found bail, as ordered by the Court, then if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him with double costs." But see 5 & 6 Vict., c. 97.

X. RELATIVE TO EJECTMENTS UNDER THE 11 Geo. 4 & 1 Will. 4, c. 70*.

By the 11 Geo. 4 & 1 Will. 4,

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, after reciting, "That, landlords to whom a right of entry into or upon any lands or here-

* It is no objection to a declaration in ejectment, not brought by a landlord against his tenant, that the notice directed by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, is subscribed, provided it is served before the essoign-day. (*Anon.*, M. T. 1830, B. C., 1 D. P. C. 18).

ditaments may accrue during or immediately after Hilary and Trinity Terms respectively, are at present unable to prosecute ejectments against their tenants, so as to try the same at the assizes immediately ensuing, whereby much delay is occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords;" it is therefore enacted, "That, in all actions of ejectment hereafter to be brought in any of his Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity Term respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment intitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the Court in which such action may be brought, and proceedings shall be had on such declaration, and rules to plead entered and given in such and the same manner as nearly as may be as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in such action may at any time before the trial thereof apply to a Judge of either of his Majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes, and that it shall be lawful for the Judge in his discretion to make such order in the said cause as to him shall seem expedient."

where a landlord's right of entry accrues in Hilary or Trinity Terms, he may proceed in those terms;

By sect. 37, it is enacted, "That, in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to intitle such declaration specially of the day next after the day of the demise therein, whether such day shall be in term or in vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title."

the declaration to be intitled the next day after the demise;

By sect. 38, it is enacted, "That, in all cases of trials of ejectments at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the Judge before whom the cause shall be tried to certify his opinion on the back of the record that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith, and the costs may be taxed and judgment signed and executed afterwards at the usual time, as if no such writ had issued: provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly that the cause came on for trial at Nisi Prius, at such a time and place, and before such a Judge, (naming the time, place, and Judge), and that thereupon the said Judge certified his opinion that a writ of possession ought to issue immediately."

and possession may be given in vacation.

DOE *d.* NORRIS *v.* ROE, H. T. 1833. B. C. 1 *D. P. C.* 547.

But the statute applies only to issuable terms and the assizes*;

THE question was, whether this case came within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 36. The title of the plaintiff accrued during Hilary Term; the application was made under the above statute. The property was situate in Middlesex; and the question therefore was, whether the act applied to cases where the trial of the ejectment would not be at the assizes, but at Nisi Prius, in Middlesex.

Per Parke, J.—The case contemplated by the statute is, where, unless a speedier remedy is given, the landlord would, when his title accrued in Hilary Term, be driven over to the Summer Assizes to try his cause, but here the plaintiff may try it in Easter Term without waiting until the Summer Assizes.

DOE *d.* SUMMERVILLE *v.* ROE, M. T. 1834. C. P. 4 *M. & Scott*, 747.

and does not apply where the tenancy expired before the first day of the issuable term.

IN ejectment, under 1 Will. 4, c. 70, s. 36, between landlord and tenant—

The Court held, that the statute 11 Geo. 4 & 1 Will. 4. c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues during or immediately after an issuable term, does not apply to the case of a tenancy under an agreement expiring the day before the first day of the term.

XI. RELATIVE TO EJECTMENT ON A VACANT POSSESSION AND NO DISTRESS.

DOE *d.* SCHOVELL *v.* ROE, E. T. 1835. Ex. 3 *D. P. C.* 691; S. C. 2 *C., M. & R.* 42.

Houses being uninhabited and unfurnished must be proceeded for as in case of vacant possession†.

THE premises sought to be recovered by this action consisted of four houses, and it appeared that service had been regular as to two, but the other two were unfurnished and uninhabited. They were wholly unoccupied, and no one being found therein the notice of declaration was stuck up on the premises.

Alderson, B.—You must proceed in this case as on a vacant possession.

* Where a landlord's right of possession accrues on the day after the essoign day of Trinity Term, he is not entitled to serve declaration in ejectment as of that term under 11 Geo. 4 & 1 Will. 4, c. 70, s. 36. (*Doe* v. *Roe*, T. T. 1831, B. C., 1 D. P. C. 79).

† If a house be underlet and afterwards totally deserted, the landlord cannot resume possession, he must bring an ejectment under the statute as on a vacant possession. (*Doe* d. *Norman* v. *Roe*, M. T. 1833, B. C., 2 D. P. C. 428). Slight acts will constitute an entry in case of vacant possession. (*Doe* d. *Frith* v. *Roe*, M. T. 1833, B. C., 2 D. P. C. 431). Where the party serving only heard some one within the house, whom he believed to be the tenant, and he read aloud the declaration, and put a copy through a pane of glass:—Held sufficient for a rule nisi. (*Doe* d. *Frost* v. *Roe*, 3 Dowl. P. C. 314). Where the affidavit of the service only stated it to have been on the tenant in possession, as he believed; and from the nature of the premises and purpose for which occupied, it was impossible to get access or ascertain who was tenant:—Held sufficient. (*Doe* d. *George* v. *Roe*, 3 Dowl. P. C. 22).

DOE *d.* BRIGGS *v.* ROE, H. T. 1833. Ex. 2 *C. & J.* 202; S. C. 2 *Tyrw.* 211.

If notice be nailed on the door, and the wife calls to know what it means, and states that she will see her husband on the subject, it is not good service*.

IN ejectment, the declaration and notice, after admittance refused by a servant, was nailed on the door of the premises; and the wife of the tenant called on the following day on the party who served it, and asked what she was to do with the paper, which she produced, and on its being explained to her, she promised to see her husband, and advise him to go to the attorney of the lessor of plaintiff:—Held, not to amount to an admission of service on the wife on the premises, and insufficient.

DOE *d.* BRACEBRIDGE *v.* ROE, M. T. 1839. C. P. 7 *Scott*, 689.

The landlord's not knowing whether there is a sufficient distress is no ground for sticking up declaration and notice.

IN an action of ejectment, it appeared that the premises were shut up, so that the landlord could not know whether there was any sufficient distress thereon, so as to proceed on a vacant possession.

The Court refused to allow the sticking up of the declaration and notice on the premises to be deemed good service, to enable him to proceed in ejectment.

TENNY *d.* GIBBS *v.* MOODY, E. T. 1825. C.-P. 3 *Bing.* 3; S. C. 10 *Moore*, 252.

Under 4 Geo. 2, it suffices to shew a half-year's rent to be due, and a variance in the particulars is immaterial.

A., BY her will, devised certain hereditaments to her niece for life, and after her decease to the uses therein mentioned, subject to a declaration that, notwithstanding such devise, certain trustees therein nominated should be receivers of the rents, with power to make distresses, to grant leases, to repair and pay other outgoings subject thereto, and to pay over the clear net rents to such niece, for her sole use, &c. In ejectment to recover premises forfeited by non-payment of rent, there was a variance between the amount of rent stated in the particulars of the demand of the lessors of the plaintiff and the amount proved to be due on the trial:—Held, that such variance was not material.

XII. RELATIVE TO THE ANCIENT MODE OF PROCEEDING AND WHEN IT MUST BE OBSERVED†.

* To obtain judgment against casual ejector on a vacant possession, the affidavit, that six months' rent is in arrear, may be made by a receiver. (*Anon.*, 1833, C. P., 3 M. & Scott, 751). The affidavit of there being no sufficient distress on the premises must be positive; the deponent's belief will not do. (*Doe* v. *Roe*, M. T., 1833, B. C., 2 D. P. C. 413).

† When the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable; for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. (*Rex* v. *Mayor of Bristow*, 1 Keb. 690; *Sherman* v. *Cocke*, 1 Keb. 795; Gilb. Eject. 38). When also the premises are vacant and wholly deserted by the tenant, and his place of residence is unknown, (*Savage* v. *Dent*, 1 Stra. 1064; *Jones* d. *Griffiths* v. *March*, 4 T. R. 484), the modern practice cannot be adopted. When, therefore, the tenant brings his action in a superior court, the possession being vacant and the lessor's abode unknown, and when he is desirous of trying his title in a court of inferior jurisdiction, all the forms of the ancient practice must be observed; a lease must be sealed upon the premises, an ouster actually made, and the parties to the suit will be real and not imaginary persons.

XIII. RELATIVE TO THE APPEARANCE, AND JUDGMENT AGAINST THE CASUAL EJECTOR FOR NON-APPEARANCE.

(*a*) When the parties appear*.

(*b*) Where the parties do not appear, and judgment against casual ejector†.

Doe *d.* Morgan *v.* Roe, E. T. 1837. Ex. 5 *D. P. C.* 605; S. C. 2 *M. & W.* 423.—S. P. Doe *d.* Welhon *v.* Roe, M. T. 1836. B. C. 5 *D. P. C.* 271.

Judgment against casual ejector should

A rule was obtained to set aside judgment against the casual ejector for irregularity, on the ground that the judgment was signed without an appearance having been entered.

* A person cannot be compelled to come in and defend until served with a copy of the declaration. (*Doe* d. *Younghusband* v. *Roe*, H. T. 1822, C. P., 6 Moore, 480). The appearance of tenants in possession to country ejectments, served before the first day of any Michaelmas or Easter Term, must be within four days after the end of such terms respectively. (Reg. Gen., E. T., 1821, K. B., 4 B. & A. 539. Same Rule, E. T. 1821, C. P., 2 B. & B. 705; 5 Moore, 637. Same Rule, Ex., 8 Price, 504; 9 Price, 299). The appearance should be entered of the term mentioned in the notice.

In the K. B., where the service is in London or Middlesex, and the notice has required the tenant to appear on the first day of term, the practice is stated to be, that the motion for judgment against the casual ejector should be made in the beginning of term, and that then the tenant must appear in four days after, or the plaintiff may sign judgment; but that if the motion be made later in the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, in order to enable the plaintiff to proceed to trial at the sittings after term; but that if the motion be not made before the last four days of the term the tenant need not appear until two days before the first day of the subsequent term. (2 Tidd. 1218, cited Adams' Ejectment, 2nd ed. 217, 218). In a country cause the motion should be made in all cases in the term in which the notice required the tenant to appear. (Rule E. T., 2 Geo. 4, 2 Chit. Rep. 375, K. B., T. 1219). The appearance is effected by defendant's attorney filling up a blank consent-rule, at the foot of which he signs his name. After entering an appearance, the attorney engrosses a plea of not guilty, and annexes it to the consent-rule.

Where a party is served as tenant in possession, and he swears that he is under-lessee of the premises sought to be recovered, the Court will not set aside an appearance entered by him on a suggestion by the lessor of the plaintiff that the tenant has no interest in the premises. (*Doe* v. *Gee*, E. T. 1841, B. C., 9 D. P. C. 612).

† Where there is not any appearance (which may be known by searching the Judges' books in the K. B., or the prothonotary's plea-book in the C. P.), the plaintiff must draw up a rule for judgment with the clerk of the rules in the former, and the secondary in the latter Court, and then make an incipitur of the declaration, and a roll of that term. These he must carry to the clerk of the judgments in the K. B., and to the prothonotary in the C. P., who, on seeing the rule for judgment, will sign it accordingly. But in the C. P. the plaintiff must make out a warrant of attorney for the defendant, and carry it, with the other papers, to the prothonotary, when he signs the judgment. (See Run. Ejectment, 450). Service in ejectment, on any of the days intervening between Thursday next before and the Wednesday next after Easter-day, when they fall within Easter Term, is insufficient for judgment against the casual ejector. (*Doe* d. *Frodsham* v. *Roe*, E. T. 1838, B. C., 6 D. P. C. 479). If a regular service be effected before the term in which the appearance is to be made elapses, a motion for judgment may be made in the following term on the same service. (*Doe* d. *Thomson* v. *Roe*, E. T. 1835, B. C., 3 D. P. C. 575). Where the notice at the foot of a declaration in ejectment was to appear in Michaelmas Term, and the motion for judgment was not made till Hilary Term, the Court will only grant a

Per Cur.—There is no such practice; it should be understood, that in future no appearance will be required; and if entered, the costs of it will not be allowed.

be signed without entering an appearance for him.

DOE *d.* LAUFORD *v.* ROE, H. T. 1834. C. P. 1 *Bing. N. S.* 161.

ON a rule calling on the tenants in possession to shew cause why the rule for judgment against the casual ejector should not be drawn up, it was contended, that the application had been made at an improper time, and it could not be complied with without violation of a fixed and rigid rule of the Court. The rule of this Court, 32 Car. 2, requires that this motion shall be made in town causes within one week next after the first day of Michaelmas or Easter Term, and within four days after the first day of Hilary or Trinity Term. This motion was not made until the sixth day of this Trinity Term, whereas it should have been made upon the fourth. It should be observed that the rule of Car. 2, to which the attention of the Court is now called, has not been altered or interfered with by any act of Parliament, or any of the late rules of Court. The rule, therefore, should be discharged.

In the C. P., the judgment against the casual ejector must still be as prescribed by rule of Car. 2.

The Court admitted that this rule of the Common Pleas had not been noticed nor interfered with by the rules and regulations which had been promulgated within the last few years, nor by any act of Parliament; and therefore they felt themselves obliged to discharge the rule, but without costs.

REG. GEN. H. T. 1838. C. P. 4 *Bing. N. S.* 366.

IT is ordered, that from and after the first next Easter Term, every motion for judgment against the casual ejector, in ejectment in London and Middlesex, may be made any day during the term.

Judgment against casual ejector may be moved any day during the term;

DOE *v.* ROE, T. T. 1833. B. C. 2 *D. P. C.* 196.

THE service of the declaration was in Hilary vacation, and an appearance was required in Easter Term. No application was made

and will be allowed after the

rule nisi. (*Right* d. *Jeffrey* v. *Wrong*, H. T. 1834, Ex., 2 D. P. C. 348). The rule of Trin., 32 Car. 2, requiring the motion for a rule nisi against the casual ejector to be made within the first four days, held not to be affected by the late changes; and where the action was for forfeiture on breach of covenant, the Court discharged the rule. (*Doe* d. *Glynn* v. *Roe*, T. T. 1834, C. P., 2 D. P. C. 822.) Under particular circumstances, the Court will dispense with the rule in C. P., requiring an application for judgment against the casual ejector to be made within the four first days of term; (*Doe* d. *Davies* v. *Roe*, H. T. 1838, C. P., 6 D. P. C. 461); but judgment against the casual ejector allowed, although the declaration is intitled of a term not arrived, the notice as to the time to appear being right. (*Doe* d. *Crooks* v. *Roe*, M. T. 1837, C. P., 6 D. P. C. 184). Where the declaration in ejectment contains both joint and several demises, it is sufficient to intitle the affidavit, on motion for judgment, as being on the several demises of all the lessors of the plaintiff, without noticing which are joint and which are several; (*Doe* d. *Barles* v. *Roe*, H. T. 1837, Ex., 5 D. P. C. 447); but an affidavit stating a "reading over" the declaration without "explaining" is insufficient, in order to obtain judgment against the casual ejector. (*Doe* d. *Wade* v. *Roe*, T. T. 1837, C. P., 6 D. P. C. 51). Service on the administratrix of the tenant last in possession, she not residing on the premises, and it not appearing by the affidavit what was the interest of the late tenant, nor describing the party as administratrix:—Held insufficient. (*Doe* d. *Rigby* v. *Roe*, 4 Dowl. P. C. 14). Where, on account of the neglect of the tenant to give the landlord notice, there had not in fact been a trial, the Court set aside the judgment against the casual ejector, although the possession had been changed, on the terms of paying costs, and the possession in the mean time retained. (*Doe* d. *Ingram* v. *Roe*, M. T. 1822, Ex., 11 Price, 507).

lapse of one term since the service,

in that term for judgment, and the motion now was in Trinity Term, to be allowed to sign judgment against the casual ejector. *Doe* v. *Roe*, (1 D. P. C. 494), was relied on; in which Mr. Justice *Littledale*, on a similar application, observed, "If you only allow one term to go by after the service, I can grant the rule; but if you permit two terms to elapse, I cannot grant it. It is contrary to the practice of this Court."

Taunton, J.—On the authority of that case, I will grant a rule.

DOE *d.* BEAVAN *v.* ROE, T. T. 1837. C. P. 5 *Scott*, 618.

on terms.

ON motion for judgment against the casual ejector—

The Court allowed it to be signed upon terms, although not moved for within the proper time.

DOE *d.* MULLARKY *v.* ROE, H. T. 1840. Q. B. 3 *P. & D.* 316; S. C. 11 *A. & E.* 333.

Even after execution, on judgment against the casual ejector, the landlord will be allowed to defend;

EJECTMENTS were brought to recover the possession of premises at Maidstone and Barming, in the county of Kent. The rule for judgment had expired upon the 29th November; upon the 2nd of December judgment was signed for want of appearance, and upon the 7th possession had been given by the sheriff. An application was afterwards made, upon the 9th of January, on behalf of two persons of the name of Buckland, who were tenants of the premises, to *Patteson*, J., at chambers, to be let in to defend, when the following order was made: "I do order that, upon payment of costs, the judgment and all proceedings be set aside, and that Buckland the elder, and Buckland the younger, be allowed to plead as tenants."

The Court, however, said, that there appeared to be no difficulty in making such an order at chambers, where a proper case for interference was made out, as it would be presumed was the case here; and although no express decision might be found warranting such a course, the practice had prevailed and been acted upon for a great many years.—Rule refused.

DOE *d.* MUSSELWHITE *v.* ROE, T. T. 1840. C. P. 8 *Scott*, 471.

but after a term between declaration and motion for judgment, the rule is only nisi.

IN an action of ejectment, on motion for judgment against the casual ejector, it appeared that a term had elapsed between the service and motion for judgment against the casual ejector.

The Court only granted a rule nisi.

DOE *d.* HINDLE *v.* ROE, H. T. 1838. Ex. 6 *D. P. C.* 393; S. C. 3 *M. & W.* 279.

If there be four tenants, service on three, and affixing the notice on the door of the fourth, is sufficient for a rule nisi*;

IN this action of ejectment there were four tenants, lessees of adjoining houses. Service had been on three personally; but the fourth having left the premises, the service was by affixing to the door.

The Court granted the rule nisi, for judgment against the casual ejector to be served in the same way, although the landlord might have proceeded as on a vacant possession.

* But judgment should only be signed against those served. (*Doe* d. *Slee* v. *Roe*, M. T. 1839, B. C., 8 D. P. C. 56).

DOE *d.* VERNON *v.* ROE, H. T. 1839. Q. B. 2 *N. & P.* 237.

and after four terms, a term's notice is necessary;

IN ejectment, the defendant never appeared; but the tenant obtained an order for a particular of the premises sought to be recovered, and also an order, made by consent, that the defendant should have ten days' time to plead after its delivery, pleading issuably, &c., but no steps were taken by the plaintiff for above four terms.

The Court held that the defendant was nevertheless entitled to a term's notice of any step being taken; and judgment having been signed without, it was irregular.

DOE *d.* GILES *v.* ROE, H. T. 1839. B. C. 7 *D. P. C.* 579.

but judgment against casual ejector refused, when declaration dated of a term not yet arrived*, and no date to notice.

ON motion for judgment against the casual ejector in Michaelmas Term, it appeared from the affidavit that, previous to the term, a regular service of the declaration had been effected on the tenant. The notice required the tenant to appear in next Michaelmas Term, but there was no date attached to it, and the declaration was erroneously intitled as of Trinity Term, of the second year of the reign of Victoria. That term had not yet arrived.

Per Littledale, J.—There are two mistakes: 1st, that the declaration is wrongly intitled; the second, that the notice has no date whatever. How is it possible for the tenant to know what he is to do when served with such a declaration and notice? The rule must be refused.

DOE *d.* WALKER *v.* ROE, E. T. 1832. Ex. 2 *C. & J.* 381; S. C. 2 *Tyrw.* 459.

So, if declarations be accepted by an attorney of a different Court, it will not authorize judgment to be signed.

MOTION for judgment against the casual ejector, on an affidavit that the declaration and notice had been accepted by an attorney of the Common Pleas, who did not appear by the affidavit to be an attorney of this Court.

Bayley, B.—If he be not an attorney of this Court, how are we to animadvert upon him if he has acted wrongfully in the matter? We ought not to grant a rule nisi, so as to impose on the party the expense of two rules. It will be very easy to get the declaration accepted by an attorney belonging to this Court.—Rule refused.

DOE *v.* ROE, T. T. 1832. Ex. 2 *C. & J.* 670; S. C. 3 *Tyrw.* 724.

One rule suffices, although there be several tenants in possession.

ON motion for judgment against casual ejector, it appeared that there were two tenants in possession of the premises sought to be recovered by this ejectment, and a separate copy of the declaration in ejectment and notice was served upon each.

Per Cur.—This is but one ejectment; service upon one of several joint-tenants was good as to all.

DOE *d.* THORN AND ANOTHER *v.* ROE, E. T. 1839. C.P. 7 *Scott*, 172.

Where several demises, affidavit must be intitled in the names of all the lessors of the plaintiff.

IN an action of ejectment, on motion for judgment against the casual ejector, the affidavit was objected to; and—

The Court held, that where there are several demises, the affidavit for the rule for judgment against the casual ejector must be intitled in the names of all the lessors of plaintiff.

* But will be granted if the wrong title will not mislead. (*Doe* d. *Smithers* v. *Roe*, M. T. 1835, Ex., 4 D. P. C. 374).

DOE *d.* BATH *v.* ROE, E. T. 1838. C. P. 4 *Bing. N. C.* 675; S. C. 6 *Scott*, 443.

In country ejectments, where declaration served before essoign day, judgment may be moved for in following term*.

IN an action of ejectment, it appeared that the premises were situated in the country, and the venue laid at the assizes. The declaration was served before the essoign day of the term in which the tenant was required to appear.

The Court held that the lessor of plaintiff was entitled to move for judgment in the following term.

XIV. RELATIVE TO THE LANDLORD'S APPEARANCE, AND TENANT'S NOT GIVING LANDLORD NOTICE OF EJECTMENT †.

DOE *d.* EMERY *v.* ROE, M. T. 1839. C. P. 7 *Scott*, 769.

Landlord has no right to appear until rule for judgment obtained‡.

IN an action of ejectment, on motion for judgment against the casual ejector—

The Court held, the landlord had no right to appear until a rule for judgment against the casual ejector had been obtained.

DOE *d.* THOMPSON *v.* ROE, T. T. 1835. C. P. 2 *Scott*, 181; S. C. 4 *D. P. C.* 115.

Where collusion is denied between the lessor of the plaintiff and tenant, the landlord will not be let in to defend after judgment signed.

A. B., CLAIMING to be landlord of the premises for which this ejectment was brought, (but not shewing how or when he became landlord), after judgment and execution for the lessor of the plaintiff, obtained a rule calling upon the latter to shew cause why the judgment should not be set aside, and he be admitted to defend.

The Court said, in the absence of a suggestion of collusion between the lessor of the plaintiff and the tenant, the Court will not set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend.

* If in a country ejectment, the notice is to appear in one term, but the application for judgment is not until the following, it is a matter of course to grant the rule, (*Doe* d. *Wiggs* v. *Roe*, T. T. 1837, B. C., 5 D. P. C. 662), without a rule nisi. (*Doe* d. *Croone* v. *Roe*, H. T. 1838, B. C., 6 D. P. C. 270).

† Before 4 Geo. 2, no means existed by which the tenant could be compelled to appear. (*Goodright* v. *Hart*, E. T. 1728, K. B., 2 Stra. 830).

By 11 Geo. 2, c. 19, s. 13, it is provided, "That the landlord may make himself a defendant in ejectment, though the tenant refuses to appear; and though judgment is signed against the casual ejector, the Court shall order a stay of execution till they make further order thereon."

By 11 Geo. 2, c. 19, s. 12, it is enacted, "That every tenant, to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to the landlord, &c., under the penalty of forfeiting the value of three years improved rent."

‡ But where the tenant has appeared and pleaded, the consent-rule may be drawn up, although no rule for judgment obtained. (*Doe* d. *Kerr* v. *Roe*, M. T., 1839, C. P., 7 Scott, 701).

DOE *d.* MEYRICK *v.* ROE, T. T. 1832. EX. 2 *C. & J.* 682.

RULE to shew cause why the judgment signed against the casual ejector should not be set aside, and the landlady of the premises let in to defend, on an affidavit imputing collusion to the tenant and the lessor of the plaintiff, and stating that the landlady had no notice of the service of the declaration from the tenant, or of the action, before judgment was signed—

Aliter, if collusion appears.

Bayley, B.—It seems to me, that the party may be let in to defend on paying the costs; and that the judgment and execution ought to be set aside, the defendant undertaking to take short notice of trial.—Rule absolute.

DOE *d.* HORTON *v.* RHYS, H. T. 1828. EX. 2 *Y. & J.* 88.

IN an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent-rule to defend as landlord.

But the Court will not allow a party claiming adverse title to defend as landlord.

Per Cur.—In ordinary cases, where an ejectment is brought by a landlord against his tenant, all that it is necessary to prove is the relation which subsists between them, and upon that the landlord is entitled to recover the possession of the premises; but if the present defendant were allowed to defend as landlord, the plaintiff might be met with an adverse title.

DOE *d.* DAVIES *v.* CREED, H. T. 1829. C. P. 5 *Bing.* 327; S. C. 6 *M. & P.* 648.

IN ejectment, the respective lessors of the plaintiff, in Easter Term, 6 Geo. 4, obtained two several judgments in actions of debt on bond against one Edward Chinn. On the 14th of May in the same term, they sued out two elegits, which were delivered to the sheriff of Herefordshire on the same day. Inquisitions were taken upon both writs on the 31st of May, each inquisition finding the debtor to be, on the day of taking the inquisition, seised of the same lands; and lands to the yearly value of 76*l.*, stated in the first inquisition to be a moiety of the whole, were delivered to the plaintiffs under the first elegit; and lands to the yearly value of 18*l.*, stated in the second inquisition to be also a moiety of the whole of Chinn's lands, were also delivered under the second elegit to the plaintiffs in the second action. The defendant Creed, claiming under a conveyance from Chinn, was admitted to defend as landlord upon the usual terms. The tenants not defending, judgment was signed against them. In the first action, it was objected, on the part of the defendant, that the lessors of the plaintiff were not entitled to recover, no notice to quit having been served upon the tenants. The learned Judge thereupon directed a nonsuit.

A party who defends as landlord cannot, after the occupiers have suffered judgment by default, object, that his tenants had not received notice to quit.

The Court, thinking the point raised in the first action—viz. as to whether or not the tenants should have had notice to quit—embraced a point of practice of some difficulty, took time to consider The rule for setting aside the nonsuit was subsequently made absolute; thus, in effect, deciding that notice to quit was not necessary.

XV. RELATIVE TO THE CONSENT-RULE*.

DOE *v.* HORN and Others, E. T. 1837. Ex. 3 *M. & W.* 333.

Tenants defending as landlords may shew a sub-tenancy in others.

IN ejectment for an undivided sixth of premises taken by some of the defendants, and converted into a railway. The latter, with the other tenants in common, having entered into the consent-rule, and defended as landlords—

The Court held, that they were not thereby precluded from shewing a sub-tenancy in others not properly determined, as shewing want of legal title to the possession in the lessor of the plaintiff; and thought that the purposes to which the land had been converted by the company, effectually excluding the co-tenants, would amount to an actual ouster.

DOE *d.* SNAPE *v.* SNAPE, H. T. 1832. Ex. 2 *C. & J.* 214; S. C. 2 *Tyrw.* 340.

If a tenant denies he is in possession, and undertakes that execution may issue if he be, his name will be struck out of the appearance and consent-rule†.

IN ejectment, motion was made to strike out the name of Butler from the appearance and consent-rule, upon an affidavit that he was in possession of no part of the premises sought to be recovered.

The Court granted the rule absolute in the first instance, upon Butler's undertaking to permit execution to issue for any part of the premises of which he might be in possession.

DOE *v.* JORDAN, E. T. 1836. C. P. 4 *Scott*, 370.

If a fraud be practised with

IN ejectment, it appeared that the premises had been purchased by F. in the defendant's name, and who had been let in to defend

* If the tenant appears, then he enters into the consent rule, the substance of which is as follows:—1st. He consents to be made defendant instead of the casual ejector. 2nd. To appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. 3rd. To receive a declaration, and plead not guilty. 4th. At the trial of the issue to confess lease, entry, and ouster, and insist upon title only. To this rule are to be added the two following conditions:—1st. If, at the trial, the defendant shall not confess lease, entry, and ouster, whereby plaintiff shall not be able to prosecute his suit, defendant shall pay to plaintiff the costs of nonpros, and judgment shall be entered against the casual ejector by default. 2nd. If a verdict shall be given for defendant, or plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant. (See Adams, Ejectment, 32).

And by Rule H. T., 1 & 2 Geo. 4, K. B., C. P., and Ex., it is ordered, that the defendant must specify in the consent-rule for what premises he intends to defend; and must consent in such rule to confess upon the trial that the defendant, if he defends as tenant, or in case he defends as landlord, that his tenant was at the time of the service of the declaration in the possession of such premises; and, if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be liable further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. (5 Moore, 310; S. R. 2 B. & B. 470; S. R. 2 Chit. Rep. 375; S. R. 9 Price, 299).

† So, the Court allowed the names of certain lessors to be struck out, the tenants appearing to claim under them, and the action having been brought to protect their interests against the other lessors, although alleged to be merely trustees, and indemnity offered. (*Doe* d. *Phillips* v. *Roe*, 4 Scott, 359). The defendant must confess ouster, unless a tenant in common. (*Doe* d. *Wells* v. *Roe*, H. T. 1836, B. C., 4 D. P. C. 628).

under the common consent-rule, but who, it was sworn and not denied, was a pauper.

respect to the consent-rule, the Court will interfere.

The Court held, that they had power to interpose, if it appeared that the consent-rule had been the means of committing a fraud, and that the lessors of the plaintiff were not prevented by it from applying to the Court by an order for delivery of a particular of the breaches for which the forfeiture was incurred, with a stay of proceedings; but that, it being positively sworn that F. was really acting on the behalf and as agent for the defendant, it could not compel him to be a party to the consent-rule.

XVI. RELATIVE TO BAIL*. See also ante, Div. IX. *Relative to Ejectments under* 1 *Geo.* 4, *c.* 67.

XVII. RELATIVE TO THE EFFECT OF BRINGING.

BRIDGES *v.* SMYTH, H. T. 1829. C. P. 5 *Bing.* 410; S. C. 2 *M. & P.* 470.

H. S. DEMISED premises to the plaintiff for a term of years, and died. The property descended to his heir-at-law, who devised it to the defendant for life, and died. The defendant conceiving she had a claim, as heir-at-law of H. S., declined to take as devisee. The real heir-at-law then brought ejectment, obtained judgment by default, and sued out a writ of possession. To defeat his claim, the defendant then brought ejectment against the tenant (the plaintiff), laying the demise on the 2nd March, 1814. The plaintiff continued to occupy after the expiration of the demise to her by H. S., but she had never paid rent to the defendant.

A party who brings an action of ejectment cannot afterwards raise the relation of landlord and tenant, and distrain†.

The Court held, that as the defendant, by bringing ejectment, had treated the tenant as a trespasser, she could not afterwards distrain for rent.

XVIII. RELATIVE TO CONSOLIDATING ACTIONS‡. See also ante, tit. *Consolidating Actions.*

* Before judgment against a casual ejector appearance should be entered. (*Bouchier* v. *Friend*, M. T. 1681, K. B., 2 Show. 260). But it need not be entered until after the rule for judgment is drawn up. (See Gilb. Ejectment, 21). The reason for this form seems to be, that there is no cause in Court against the casual ejector before appearance is entered, and, therefore, nothing upon which judgment can be grounded. (See Gilb. Ejectment, 22).

† Receipt of rent, after an ejectment is brought for a forfeiture, is no waiver of it. (*Doe* v. *Meux*, 1824, N. P., 1 C. & P. 346).

‡ Where several ejectments are brought depending on the same title, the Court will consolidate. (*Anon.*, 2 Sellon, Prac. 144; S. P. *Smith* v. *Crabb*, H. T., 1740, K. B., 2 Stra. 1149).

XIX. RELATIVE TO THE PLEAS.

(*a*) General issue*.

Reg. Gen., T. T. 1838. K. B. and C. P. 3 *N. & P.* 2; S. R. 4 *Bing. N. S.* 365.

The plea is to be delivered like other pleas.

It is ordered, that, in ejectment, the plea, with the consent-rule, be delivered in like manner as other pleas, the defendant's appearance being first entered.

(*b*) Of special pleas†.

(*c*) Signing judgment for want of.

Reg. Gen., T. T. 1840. Ex. 7 *M. & W.* 345.

If the plaintiff omits to reply to the defendant's plea, he is entitled to judgment of non pros.

By this Rule, it is ordered, that the plaintiff be entitled to a rule for judgment, upon plea by the defendant, at any time after service of declaration, and before the 4th day after the term in which defendant is required to appear; and where plaintiff omits to reply thereto, the defendant to be entitled to sign judgment of non pros.

XX. RELATIVE TO THE REPLICATION‡.

XXI. RELATIVE TO THE ISSUE§.

* Not guilty is the general issue to this action; and it seldom happens, by reason of the consent-rule, that the defendant can plead any other plea. (See Selw. N. P. 714; Peters. Sup. Blac. 153; Adam's Ejectment, 241).

† By permission of the Court defendant may plead to its jurisdiction. (*Doe* d. *Hamilton* v. *Robinson*, M. T. 1739, K. B., 2 Stra. 1120). And plea of release by the real parties is good. (*Doe* d. *Byne* v. *Brewer*, T. T. 1815, K. B., 4 M. & S. 300).

‡ When the party appearing has entered into the consent-rule and pleaded, he may move for a rule to reply before the plaintiff's lessor has joined in the consent-rule, and the plaintiff may be non prossed; but, as the plaintiff is only a fictitious person, the defendant will not be entitled to costs. (See Blac. 763).

§ The issue must agree with the declaration; but if there be a difference in the defendant's name, the Court will set it right. (*Bass* v. *Bradford*, M. T. 1725, K. B., 2 Ld. Raym. 1411).

XXII. RELATIVE TO THE EVIDENCE*.

(*a*) Of defendant's possession†.

(*b*) Of the title‡.

Rees *v.* Bowen, T. T. 1825. Ex. 1 *M. & Y.* 383.

An examined copy of an affidavit, used in equity by the representative of a trustee, is not evidence of title without proof of identity.

In ejectment, on a demise in the name of the representative of a surviving trustee of an outstanding term, in order to shew an admission by the defendants that such representative had an interest in the premises, an examined office-copy of an affidavit, purporting to be made by a person of the same name and description of the defendant, intitled in a suit in equity by him, and alleged to have been put in to ground a motion for an injunction, was offered in evidence.

The Court held, that such copy was not admissible without proof of the identity of the defendant, and that the original affidavit had been used.

Doe *d.* Philips *v.* Morris, E. T. 1835. K. B. 4 *N. & M.* 598.

Where the defendant's title by will was proved, and no notice to produce, a witness cannot be asked whether another will was not signed.

In an action of ejectment, the defendant having admitted the title as heir, and proved a will duly executed:—Held, that the plaintiff, not having given notice to produce, could not ask a witness whether the deceased had not, a fortnight after, in the presence of himself and others, signed another paper, and declared it to be his last will; and such latter paper having been traced to the possession of the defendant, the Court could not presume it to have been lost or destroyed.

* Proof of the lessor of plaintiff having received rent from the person in possession of the premises, and also from the parish officers in respect thereof:—Held admissible, although the defendant did not claim under either. (*Doe* v. *Stacey*, 1833, N. P., 6 C. & P. 139). But where the tenancy is only established by payment of rent, and no demise is shewn, or that the defendant was let into possession by the plaintiff, it is competent to the defendant to explain the payment, and shew on whose behalf it was received. (*Doe* v. *Francis*, 1834, N. P., 2 M. & Rob. 57). In ejectment, declarations of a deceased occupier as to the party of whom he held them as tenant:—Held admissible. (*Doe* d. *Marjoribanks* v. *Green*, 1819, N. P., Gow, 227).

† The defendant must be shewn to be in possession of the premises which the plaintiff seeks to recover; hence, where a defendant, on being served with a declaration, assented to the character of tenant, it was holden sufficient evidence of possession. (See 2 B. & A. 371). The common consent-rule is now made evidence of that fact; (see 2 B. & A. 196; 3 B. & B. 470; 2 Chit. Rep. 375); and in *Fenn* d. *Blanchard* v. *Wood*, M. T. 1796, C. P., 1 B. & P. 573; S. P. *Goodright* v. *Rich*, 7 T. R. 327, it was holden, that, if a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the plaintiff can only recover such premises as the tenant is proved to be in possession of.

‡ The title proved must be consistent with that stated in the declaration. In other words, the plaintiff must shew that he has a legal and valid right to the premises in question. (See 6 Rep. 14 b; Co. Lit. 45). Where A. devised the residue of a term determinable on lives to B. After the decease of the testator, the administrator with the will annexed paid the rent reserved on the term for six years, and charged it to B:—Held, that this was sufficient evidence of his assent to the bequest, to enable B. to maintain ejectment. (*Doe* v. *Mabberley*, 1833, N. P., 6 C. & P. 126). Where a will, under

DOE *d.* STRODE *v.* SEATON, M. T. 1835. Ex. 2 *C., M. & R.* 728; S. C. 1 *Tyrw. & G.* 19.

A judgment recovered on a former ejectment between the same parties is evidence of title against the lessor, on the trial of a second ejectment.

IN a second action of ejectment brought by the same party, and for the recovery of the same premises as in the case of *Doe* v. *Seaton*, (2 Ad. & El. 171, post, p. 557), in the King's Bench, 1834. The object of the present action was, to try again what was the interest really possessed by Colonel John Strode, from whom the lessor of the plaintiff claimed as devisee under his will. As stated before, the defendants represented Weeks, who was the assignee of a lease granted by Colonel Strode to one Thomas, for twenty-one years; and on this trial, the assignment of the lease being called for, was produced by the defendants. It recited the covenants in the original lease, to pay the rent to Colonel J. Strode, his heirs or assigns, and to deliver up the possession of the demised premises to him, his heirs or assigns. That lease being produced, it was contended that the defendants were not at liberty to shew that Colonel Strode had only a life-interest, and was not seised in fee, but were in the situation of tenants, who cannot dispute their landlord's title. *Gurney*, B., before whom the case was tried, decided that the estoppel did not apply to these defendants. They, as part of their case, put in evidence the record of the judgment and the particulars of the premises in the former ejectment, and they were received, after an objection had been made to their admissibility. The verdict having been found for the defendants, the jury finding that Colonel Strode was seised as tenant for life only—

Per Cur.—One judgment in ejectment is admissible in evidence on the trial of a second ejectment, where the lessor of the plaintiff and the defendants are the same, and the title is in dispute.

(*c*) OF THE ENTRY*.

(*d*) OF THE PREMISES†.

FENN *d.* THOMAS *v.* GRIFFITH, E. T. 1830. C. P. 6 *Bing.* 533; S. C. 4 *M. & P.* 299.

If it appears that the pre-

IN ejectment, it appeared that the lessors of the plaintiff claimed the premises in question, under a lease from the mayor, bailiffs, and

which the lessors of plaintiff claimed, was in the hands of a mortgagee, who was subpœnaed to produce it, but refused to do so, as being part of his title:—Held, that secondary evidence of the contents was inadmissible. (*Per* Lord *Abinger*, C. B., denying *Mills* v. *Oddy*, (6 C. & P. 728), to be law; *Doe* v. *Owen*, 8 C. & P., 1837, N. P., 110).

* Proof of an actual entry was only necessary where a fine had been levied, with proclamations; (2 Stra. 1086; 13 East, 489; but see 3 & 4 Will. 4, c. 74, post, tit. *Fine*); nor will it be necessary on a clause of re-entry for non-payment of rent; (see Doug. 477); or for the breach of a condition. (See 3 Burr. 111; 1 East, 574; 3 M. & S. 275).

† The plaintiff is bound to put in the rule to confess lease, &c., in order that it may be seen for what premises and on what terms the action is brought. (*Doe* d. *Lamble* v. *Lamble*, 1 M. & M. 237). In an action of ejectment by the reversioner (on the expiration of a building lease), to recover possession of a house which adjoined one that the lessor of the plaintiff had sold to the defendant, and the description of which in the surrender (it being copyhold) contained the words, "as now occupied by A. B., or his under tenants," an under lease, (granted pending the existence of the original building lease), under which A. B. claimed the

burgesses of Tenby. On the part of the lessors of the plaintiff, a witness of the name of George James was called to prove the tenancy by the defendant. He stated that he remembered Alexander Thomas (the ancestor of the defendant, and after whom it was admitted he came into possession of the premises), and that he had heard him say that he held the premises under the lessors of the plaintiff. The witness, however, saying that Alexander Thomas held under a written agreement or lease, it was objected, on the part of the defendant, that inasmuch as this was evidence of a holding under a lease, the plaintiff was bound to produce it. The lease or agreement alluded to was not produced. The plaintiff had a verdict, subject to a nonsuit. On motion for that purpose—

mises were demised by writing, the writing must be produced.

Per Cur.—The plaintiff's own witness said that the former tenant, from whom the defendant derived his possession, held under an agreement in writing, that being stated on the part of the plaintiff, he was bound to produce the instrument.

(*e*) Of the ouster*.

(*f*) Of written documents and statements by deceased witnesses.

Doe *d.* Strode *v.* Seaton, M. T. 1834. K. B. 4 *N.* & *M.* 81; S. C. 2 *Ad.* & *E.* 171.

In an action of ejectment—

The Court held, where plaintiff and defendant claim through the same person, and books of the steward of the former owner of the estate are in the hands of the plaintiff's attorney, as part of the muniments of his title, the defendant is entitled to call for the production of these books, and to give in evidence entries in them in support of his own title.

If the parties claim through the same owner, entries on the steward's books of such owner are evidence†.

Doe *d.* Foster *v.* Earl of Derby, T. T. 1834. K. B. 3 *N.* & *M.* 782; S. C. 1 *Ad.* & *E.* 783.

A., claiming as heir upon the death of the ancestor in 1823, entered into two estates, H. and C., and afterwards conveyed H. to D. in 1826. B., also claiming as heir, brought ejectments against A. and D., and recovered afterwards in 1830. A. and D., having obtained further evidence, brought ejectments against B., and, upon the trial of A.'s action, many witnesses (and amongst them two since deceased) were examined, and a verdict was obtained by A.; and upon the second cause being called on, (as depending on the

Evidence of deceased witnesses in ejectment cannot be received as evidence in ejectment between different parties.

ground upon which both the houses were built, was received as evidence of the mode in which the property had been enjoyed. (*Doe* d. *Tims* v. *Jordan*, M. T. 1829, N. P., 4 C. & P. 146).

* When an ejectment is brought by one joint-tenant, parcener, or tenant in common, against his companion, the lessor may be called upon to produce the consent-rule; and if it appear that a special one has been granted, that the defendant shall confess lease and entry only, the lessor must prove an actual ouster by his co-tenant; (see Adam's Ejectment, 53); but if the consent-rule be in the common form, it will be sufficient evidence of an ouster. (See 1 Campb. 173).

† But a deed executed by cestui qui trust, not clearly against his interest, is not admissible in an ejectment by the trustee. (*Doe* v. *Wainwright*, T. T. 1838, K. B., 3 N. & P. 598).

same evidence), a verdict was submitted to. In 1834, B. brought an ejectment against D., who proposed to give in evidence the examinations of the deceased witnesses.

The Court held—first, that the evidence in the suit between B. and A., after the conveyance to D., was not admissible in the suit between B. and D.; and, secondly, that, without an express agreement that the evidence in the suit between B. and A. should be considered as repeated in that between B. and D., the evidence of the deceased witnesses could not be taken as given in the former suit between B. and D.

(*g*) WHO TO BEGIN*.

XXIII. RELATIVE TO THE WITNESSES.

DOE *v.* CLARKE, H. T. 1837. C. P. 3 *Bing. N. S.* 429; S. C. 4 *Scott*, 203.

The brother of the lessor having no immediate interest is a competent witness.

THIS was an action of ejectment to recover the great or rectorial tithes of upwards of 500 acres of land at Norbury and Thornton Heath, in the parish of Croydon. The lessors of the plaintiff claimed as heir-at-law of John Bath, the purchaser of the tithes in question, and father of Mary Bath, otherwise Clarke, who held them during her coverture with her husband. She died in 1823, and her husband held possession, as it was said, tortiously until the time of his death in 1833; and the defendants (who defended as landlords) claimed as his devisees. To rebut the title of the lessors of the plaintiff, the defendants called a witness, one John Bath, who described himself as the real heir-at-law of John Bath, the purchaser of the disputed property, being, as he stated, the descendant of John Bath, an elder brother of Henry Bath, through whom the lessor claimed. He was objected to as incompetent on the ground of interest. Lord *Abinger*, C. B., however, before whom the cause was tried, overruled the objection, and a verdict was found for the defendant.

The Court held, that he was admissible to prove such fact, and was not incompetent through interest.

* Where the lessor of plaintiff claimed as heir-at-law of the person last seised, which the defendant proposed to admit if he were legitimate, which was the question at issue:—Held, that such admission did not go so far as to admit a complete title, and to give the right of beginning. (*Doe* d. *Warren* v. *Bray*, 1828, N. P., 1 M. & M. 166). He must admit the plaintiff's whole case. (*Doe* v. *Wilson*, 1834, N. P., 2 M. & Rob. 323). So, where in ejectment by the heir-at-law to recover premises conveyed by the deceased ancestor under a deed which was impeached on the ground of his incapacity at the time of execution:—Held, that, as the seisin of the ancestor at the time of his death was not admitted, the mere admission of the lessor's title as heir by pedigree, did not entitle the defendant to begin. (*Doe* d. *Tucker* v. *Tucker*, 1830, N. P., 1 M. & M. 536).

In ejectment by heir against a party claiming under a will:—Held, that the latter was entitled to begin, (having admitted the lessor of plaintiff to be heir), notwithstanding the plaintiff professed to claim under an outstanding term of part of the premises. (*Doe* v. *Smart*, 1835, N. P., 1 M. & Rob. 476).

DOE *v.* ADDERLEY, M. T. 1837. K. B. 3 *N. & P.* 629.—S. P. DOE *v.* BOWLES, M. T. 1837. K. B. *Id.* 632, *overruling* OXENDEN *v.* PALMER, E. T. 1831. K. B. 2 *B. & Ad.* 236.—S. P. DOE *v.* MURRELL, 1837. N. P. 8 *C. & P.* 134.

So, rated inhabitants are competent to prove that the premises sought to be recovered by parish officers is parish property*.

IN ejectment to recover possession of a cottage at Gnosall, in Staffordshire, which the lessors of the plaintiff claimed as churchwardens and overseers of that parish, all the witnesses tendered by the plaintiff were rated inhabitants of the parish, and were objected to as incompetent. The learned Judge was of opinion that they were so, and nonsuited the plaintiff, but took the opinion of the jury as to the right of the lessors of the plaintiff to the cottage in question, with the understanding, that, if the jury found in favour of them upon the evidence, they should have leave to move to enter a verdict for the plaintiff. The jury found for them, and a rule nisi was obtained to set aside the nonsuit, and enter a verdict for the plaintiff.

Lord *Denman*, C. J., delivered the judgment of the Court.—On the question, whether a rated inhabitant was admissible to prove that the house sought to be recovered in ejectment was parish property, we do not feel it necessary to enter upon a discussion of the numerous and conflicting cases which have arisen on the construction of the 54 Geo. 3, c. 170, s. 9, we content ourselves with saying that the case of *Meredith* v. *Gilpin* (6 Price, 146) appears to us to be well decided, and that, on consideration, we cannot agree with *Oxenden* v. *Palmer*, and the decisions to which it has given birth. The rule must be made absolute.—Rule absolute.

DOE *v.* PEARCE, M. T. 1839. Ex. 5 *M. & W.* 506.

And a devisee of an undivided interest is admissible to prove the competency of the testator.

IN ejectment, it appeared that the lessor of the plaintiff was the widow of one Wildgoose, and claimed the premises in question under the will of her father, as tenant in common with his other children. The will had not been proved. The question at the time turned upon the competency of the testator. To prove the will, the lessor of the plaintiff called her brother, who was objected to as a party who was interested in supporting the will under which he claimed. He stated, however, on voir dire, that he had conveyed his interest in the premises to the husband of the lessor of the plaintiff, and the learned Judge admitted his evidence. The eldest son of the lessor of the plaintiff was then called, and was objected to on the ground, that, in the absence of evidence to the contrary, the interest of his father must be presumed to have descended to him. He stated that he knew nothing of the conveyance from the first witness to his father. *Coleridge*, J., received his evidence also, and the lessor of the plaintiff had a verdict.

The Court held, that a tenant in common, claiming an undivided interest in an estate under a will, is a competent witness for the

* But in a prior case by a corporation to recover lands, a member held not rendered a competent witness in support of their right by a release of all claims, &c., in respect of the particular subject-matter. (*Doe* v. *Tooth*, 1829, Ex., 3 Y. & J. 19; but see ante, tit. *Corporation*).

lessor of the plaintiff, who also claims under the same will an undivided interest in the same estate, the question turning upon the competency of the testator.

DOE *d.* LEWIS *v.* PREECE, T. T. 1831. Ex. 1 *C. & J.* 515; S. C. 1 *Tyrw.* 410.

But tenants in possession at the time of the ejectment brought, are not competent witnesses to prove an adverse possession against the lessor.

IN an action of ejectment, the landlord (defendant) proposed to call the tenants in possession of different parts of the property, upon whom ejectments had been served, to prove an adverse possession.

But *Park*, J., held them to be incompetent; and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial, but intimated an opinion that they were not competent for any purpose.

XXIV. RELATIVE TO THE TRIAL*.

XXV. RELATIVE TO THE VERDICT†.

DOE *d.* BANK OF ENGLAND *v.* CHAMBERS, E. T. 1836. K. B. 6 *N. & M.* 539; S. C. 4 *Ad. & E.* 410.

If the declaration contains two demises, taking out execution on one count does not preclude the plaintiff from entering a verdict on the other.

IN ejectment, the declaration contained two demises, and a verdict was found for the lessors of the plaintiff on one demise, with leave to take out immediate execution; and with leave reserved to move the Court to enter a verdict on the second demise, if the Court should think the evidence sustained it.

The Court held, that the plaintiff was not estopped, by reason of having taken out execution, from making the application to enter a verdict on the other demises.

XXVI. RELATIVE TO THE JUDGMENT‡.

DOE *d.* GREAVES *v.* RABY, M. T. 1831. K. B. 2 *B. & Ad.* 948.

If a defendant appears by

IN ejectment, the defendant appeared on the trial by counsel, and the plaintiff having proved his title and possession by the defendant,

* Where defendants in ejectment appeared by separate attornies and counsel:—Held, that only one counsel could address the jury where they supported the same title. (*Doe* d. *Hogg* v. *Tindal*, 1827, N. P., 3 C. & P. 565).

† Where the plaintiff has been nonsuited by defendant not appearing to confess lease, &c., the course is to apply to set aside the nonsuit, and for a new trial, and not to restore the cause to the list. (*Doe* v. *Macdonnell*, E. T. 1840, B. C., 8 D. P. C. 488).

‡ The judgment is, that the plaintiff do recover his term or terms, according to the number of demises in the declaration, of and in the tenement, which is either

it was objected that the plaintiff must produce the consent-rule before the defendant was bound to admit lease, &c., and upon the plaintiff being unable to produce it, *Littledale*, J., directed a non-suit, giving the plaintiff leave to move to enter a verdict.

counsel, and cross-examines witnesses, he cannot afterwards call for the consent-rule, there being no question as to the identity of the premises; and the plaintiff will be entitled to judgment.

Per Cur.—The plaintiff is entitled to judgment. There is no use in requiring the lessor of the plaintiff to prove the consent-rule as part of his case, except in particular instances. It might formerly have been material in order to prove the possession, when on entering into the consent-rule the party had undertaken to admit possession. By Rule of Michaelmas Term, 1830, the defendant, by entering into the consent-rule, is bound not only to confess lease, entry, and ouster, but to admit possession at the trial, so that the only case in which it may now be material for the plaintiff to produce the consent-rule is, where, at the beginning of the plaintiff's case, he states his evidence as applicable to particular premises, and the defendant is conscious that the premises are different from those for which he means to defend. The defendant may in such a case insist upon the production of the consent-rule by the plaintiff, in order to identify the premises mentioned in the rule with those to which his evidence is applicable.

See Doe d. *Hemming* v. *Armfield*, 1 *D. P. C. N. S.* 327.

XXVII. RELATIVE TO THE DAMAGES*.

XXVIII. RELATIVE TO THE COSTS.

(*a*) Security for.

Doe *d.* Hudson *v.* Jameson, T. T. 1839. K. B. 4 *M. & R.* 570.

Where a defendant defending as landlord lives abroad, security for costs ordered†.

On a rule to shew cause, "why the landlord's rule and the consent-rule in this cause should not be discharged, and the defendant's appearance and plea set aside, unless the defendant shall consent to give security for the costs in this cause to the satisfaction of the Master", upon the affidavit, stating, that the defendant then was and had for several years been resident, with his wife and family, near Greenock, in Scotland.

Lord *Tenterden*, C. J.—This is a very reasonable application.

against the casual ejector or against the tenant. Upon a verdict, the former is generally before, the latter always after, an appearance; (see Run. Ejectment, 402); but the casual ejector is not restricted in any case to confess a verdict. (See 1 Stra. 531).

* The damages are merely nominal, and it is usual to remit them in order to recover a real compensation in an action for mesne profits. (See Peters. Sup. Blac. 156; and post, tit. *Mesne Profits*).

† Where a plaintiff himself is guilty of laches, the defendant is not deprived of his claim to security for costs by obtaining time to plead. (*Fry* v. *Wells* M. T. 1834, B. C., 3 D. P. C. 6).

(*b*) Plaintiff or defendant, when entitled to.

1. *In general**.

Thrustout *v.* Shenton, M. T. 1829. K. B. 10 *B. & C.* 110.

If several actions be unnecessarily brought the Court will refuse costs.

Three ejectments had been brought, one of the defendants being tenant in possession of part of the premises and landlord of the whole, and he had obtained a rule to consolidate the three actions, and that the action against one tenant should abide the event of the one tried. The lessor of plaintiff having succeeded—

The Court directed the landlord, as the substantial defendant in all three, to pay the costs of that action; but, disapproving of three actions, refused the costs of the application.

Doe *d.* Smith *v.* Webber, H. T. 1835. K. B. 4 *N. & M.* 381.

The plaintiff disclaimed proving one title on opening his case:—Held, that the defendant was still entitled to the costs of the evidence &c. applicable to that title.

On motion for the Master to review his taxation of costs, it appeared that the plaintiff, by separate demises, put two titles in issue, one of which he was unable and did not intend to support, and the defendant succeeded on that issue.

The Court held, that the Master properly allowed him the costs of evidence to meet that title, although disclaimed by the plaintiff upon the opening, and the defendant had examined his witnesses as admissible against the other lessor of plaintiff, but which evidence was rejected as inapplicable to that title; it was for the Master to decide, whether the costs were costs in respect of one demise alone, or in respect of both.

Doe *d.* Stevens *v.* Lord, E. T. 1838. Q. B. 1 *P. & D.* 388.

When allowed to be set off,

In ejectment, the lessor of plaintiff recovered a verdict and taxed his costs in 1834, but the writ of execution was never re-

* Twelve defendants in ejectment entered into a general joint consent-rule, not specifying the premises for which they severally defended. At the Assizes the Judge made an order that the record should be amended, by allowing two of the defendants to withdraw their plea and suffer judgment by default; but no express order was made as to any amendment of the consent-rule. The trial proceeded: these two defendants did not appear, but the other ten made out a complete defence:—Held, that the order did not virtually operate as an amendment of the consent-rule also, and that the plaintiff was, notwithstanding the order, entitled to a verdict against all the defendants. But the Court directed that the ten defendants who went to trial should be allowed the costs of their defence on taxation. (*Doe* d. *Bishton* v. *Hughes*, T. T. 1835, Ex., 2 C., M. & R. 231; S. C., 4 D. P. C. 412).

The plaintiff in ejectment has a right to an amendment of the record, upon payment of costs of the application, against a defendant who refuses to give up the possession. If the defendant consents to give up possession, the plaintiff must pay the whole costs up to the time of the application. (*Doe* d. *Lewis* v. *Coles*, 1826, N. P., 1 R. & M. 380).

Where the declaration in ejectment, containing only one count and one demise, claimed several messuages, and the jury found a verdict of guilty as to some and not guilty as to another:—The Court held, that, pursuant to 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set off against those of the lessor of the plaintiff. (*Doe* d. *Errington* v. *Errington*, H. T., 1836, B. C., 4 D. P. C. 602; and see *Prudhomme* v. *Fraser*, H. T. 1835, K. B., 4 N. & M. 512).

turned, nor the judgment revived by sci. fa., and the defendant afterwards, in 1837, obtained a rule to set aside the writ of possession for irregularity, with costs. when a judgment sought to be set aside.

The Court held, that the plaintiff was not entitled to set off the costs as interlocutory costs, against the costs of the cause.

---

2. *Under* 1 *Geo.* 4, *c.* 87*.

(*c*) Liability of stranger for costs, and right to.

Doe *d.* Tansley *v.* Roe, T. T. 1840. C. P. 1 *Scott, N. S.* 401; S. C. 1 *M. & G.* 490.

In an action of ejectment, the rule for judgment was served on several parties in no way connected with the premises, and who shewed no cause against the rule. Where parties in no way connected with the premises are served they are entitled to costs.

The Court held, that they were entitled to some costs.

Doe *d.* Masters *v.* Gray, H. T. 1830. K. B. 10 *B. & C.* 615.—S. P. Thrustout *v.* Shenton, M. T. 1829. K. B. *Id.* 110.

An action of ejectment being brought, an order of vestry was made that the action should be defended by and at the expense of the inhabitants of the township of Norton. The action was accordingly defended by an attorney employed and paid by them. The lessor of the plaintiff obtained a verdict, and the costs having been taxed at 87*l.*, the plaintiff applied to the parish officers of Norton for the payment of those costs, and they having refused, a rule was obtained, calling upon them to shew cause why they should not pay the costs. The costs may be obtained from the real party to the suit though not a party on the record†.

Lord *Tenterden*, C. J.—In ejectment we can make the real party to the suit pay the costs. (*Thrustout* v. *Shenton*, 10 B. & C. 110). Here, the parish officers put a mere pauper into possession, and the lessor of the plaintiff was bound to bring the ejectment against him. The parish officers, therefore, ought to pay the costs.

(*d*) Remedy‡.

Rex *v.* Bryant, M. T. 1833. K. B. 2 *N. & M.* 666.

In 1820, an attachment issued for non-payment of costs upon a consent-rule in ejectment, brought on the demise of William Bryant. The attachment followed

* By 1 Geo. 4, c. 87, it is enacted, "That, in all cases wherein the landlord shall elect to proceed in ejectment under the provisions hereinbefore contained, and the tenant shall have found bail as ordered by the Court, then, if the landlord, upon the trial of the cause, shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him with double costs."

† But, where in an action of ejectment an insolvent defendant had been induced to defend the action by a third person, who employed the attorney and furnished money to carry on the defence, but who claimed no interest in the property sought to be recovered, the Court would not compel the latter to pay the costs of the lessor of the plaintiff. (*Doe* v. *Smith*, E. T. 1840, B. C., 8 D. P. C. 517).

‡ Where there is judgment by default, plaintiff may recover costs in action for mesne profits, but where action is defended and costs taxed plaintiff cannot recover beyond the taxed costs. (*Brooke* v. *Bridges*, 7 Moore, 471).

lowed the consent-rule in the name of the fictitious parties. But the affidavits were intitled in the names of the parties:—Held, not objectionable.

The consent-rule was intitled *Doe* v. *Roe* simply, and the attachment was intitled "In the matter of *Doe* v. *Roe*," as above, but the affidavits upon which the rule for an attachment was grounded were intitled "*Doe* d. *Bryant* v. *Chaddington*." It was contended, that the point upon which the rule nisi was granted was, whether or not the rule on which the attachment issued was properly intitled. The affidavit and rule are intitled differently. If the rule is rightly intitled, it is not founded upon a properly intitled affidavit; and if the affidavit was correctly intitled the title of the rule is wrong.

Denman, C. J.—We are some of us satisfied that the instrument is wrong; therefore let the rule be discharged.

XXIX. RELATIVE TO THE EXECUTION.

(*a*) In general*.

Doe *d.* Lucy *v.* Bennett, M. T. 1825. K. B. 4 *B. & C.* 897; S. C. 6 *D. & R.* 261.

If the landlord defends, no order for execution against the casual ejector is necessary previous to issuing execution against the defendant.

The defendant obtained leave to defend this ejectment as landlord, and entered into a consent-rule. The conclusion of the rule was in this form:—"The plaintiff nevertheless is at liberty to sign judgment against the casual ejector, but execution thereon is stayed until this Court shall further order." At the trial a verdict was obtained by the plaintiff, whereupon judgment was afterwards duly signed, and a writ of possession issued, without any further order of the Court.

Bayley, B.—The only purpose for which an order of the Court can be necessary to warrant the issuing of execution is to avoid collusion between the lessor of the plaintiff and him who comes in as landlord; but here the cause was tried, and a verdict and judgment obtained against the defendant. The lessor of the plaintiff issued his execution against *him*, and not against the casual ejector. An order for execution against the latter could not, therefore, be necessary.

Doe *d.* Lambert *v.* Roe, E. T. 1835. B. C. 3 *D. P. C.* 557.

After execution on an ejectment for forfeiture, if there be other grounds of forfeiture, the Court will not set aside the proceedings.

On a rule calling on the lessor of the plaintiff to shew cause why the writ of habere facias possessionem executed in this case should not be set aside, on payment of the rent in arrear, and of the costs of the action in ejectment, pursuant to the judgment on which the writ of possession had issued. The affidavits, however, in answer to the rule, shewed that the landlord had brought the action of ejectment, not merely on account of non-payment of rent, but for not repairing, for not building, (the original lease being a building lease),

* The lessor of the plaintiff in ejectment, who was a mortgagee, obtained judgment, and after more than a year and a day had elapsed, without reviving the judgment by sci. fa., issued a hab. fa. poss., which, after execution, was set aside by a Judge's order, but the judgment was left in force. On a motion for a rule for a writ of restitution:—Held, that such writ could not issue, but the rule ought to be moulded so as to order the lessor of the plaintiff to restore possession. (*Doe* v. *Lord*, H. T. 1838, B. C., 6 D. P. C. 256).

and also for not insuring the premises, of which the applicant was the sub-lessee.

Per Williams, J.—If the rule has been moved either from a want of proper care in obtaining correct information, or from having received incorrect information, that is the misfortune of the applicant; but the inferior landlord is not on that account to be brought before the Court by that which is only an experiment. The present rule must, therefore, be discharged with costs.

(*b*) Under 1 Will. 4, c. 70.

By 1 Will. 4, c. 70, s. 38, it is enacted, "That all cases of trials of ejectment at Nisi Prius, where a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, and ouster, it shall be lawful for the Judge, before whom the cause shall be tried, to certify his opinion, on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate a writ of possession may be issued forthwith, and the costs may be taxed, and judgment signed, and executed afterwards at the usual time, as if no such writ had issued: provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly, that the cause came on for trial at Nisi Prius, at such a time and place, and before such a Judge, (naming the time, place, and Judge), and that thereupon the said Judge certified his opinion that a writ of possession ought to issue immediately."

The 1 Will. 4, in some cases, allows immediate execution*.

XXX. RELATIVE TO THE VENIRE DE NOVO.

Doe *d.* Wright *v.* Nepean, M. T. 1837. Ex. 3 *M. & W.* 804; S. C. 5 *B. & Ad.* 80; S. C. 2 *N. & M.* 219.

On argument of cross-bills of exceptions:—Held, that, where a party had not been heard of for seven years, no rule could be laid down that the death should be presumed to have taken place on the last day of the seven years; held also, that, since 3 & 4 Will. 4, the doctrine of adverse possession, except in cases falling within s. 15, and of non adverse possession, is done away with; and the Court deciding the direction of the Judge, at the trial, on these points to have been correct, and the verdict wrongly entered for the lessor of the plaintiff,—A venire de novo awarded.

In ejectment, upon a bill of exceptions, if the verdict be wrongly entered, a venire de novo will be awarded.

* Under 1 Will. 4, c. 70, s. 38, the Judge can only grant a certificate to enable the plaintiff to obtain immediate possession, or leave him to the regular course, and not to have possession at any particular time; and, if he be nonsuit for default of the defendant's appearing to confess lease, &c., an affidavit of the circumstances ought to be read before the Judge, to enable him to exercise a discretion as to immediate execution. (*Doe* d. *Williamson* v. *Dawson,* E. T. 1831, N. P., 4 C. & P. 589).

XXXI. RELATIVE TO THE NEW TRIAL* AND SECOND ACTION FOR THE SAME PREMISES†.

LONG *v.* BILKE, H. T. 1839. C. P. 1 *M. & Gr.* 87; S. C. 1 *Scott, N. S.* 476.

A new trial will be granted if a verdict has been taken under a misapprehension as to the terms and conditions;

IN an action for use and occupation of premises, which had been under lease, and to shew the plaintiff's title, and that the lease had been avoided, a judgment against the casual ejector was given in evidence, upon the faith of which the defendant consented to leave the case upon the facts proved to the decision of the Court; it appeared, however, that the landlord having been let in to defend, the plaintiff had been non prossed, and the judgment, therefore, was alleged as a surprise.

The Court, although enough might have been proved, excluding the judgment, to entitle the plaintiff to a verdict, made a rule for a new trial absolute.

DOE *d.* BEANLAND *v.* HIRST, M. T. 1822. Ex. 11 *Price*, 475.

or if a Judge uses strong terms upon some circumstances of suspicion, and the jury find in accordance with that view, a new trial will be granted.

IN ejectment for coal mines in a registered county, where the adverse possession had not continued more than ten years, and no grant appeared to have been registered; but in a demise of the lands by those through whom the lessors of plaintiff claimed, there was a reservation of coal mines alleged to have been previously granted to a party through whom the defendant claimed, but which reservation was alleged to relate to defendant's premises; and the Judge having expressed himself to the jury in strong terms upon some circumstances of suspicion in the plaintiff's case—

The Court granted a new trial, although the verdict was conformable to the Judge's direction.

XXXII. RELATIVE TO THE WRIT OF ERROR.

DOE *d.* MORGAN *v.* ROE, T. T. 1825. C. P. 3 *Bing.* 169.

A writ of error will be set aside where no defence is made on the trial by a defendant, under terms.

IN an action of ejectment, the defendant's tenants in possession had set aside a former judgment on terms of undertaking to appear, enter into the common consent-rule, plead instanter, and take short notice of trial; but made no defence at the trial, and had sued out a writ of error.

* The Court will never grant a new trial after verdict for defendant, unless material evidence has been discovered, and on payment of costs of former. (*Weak* d. *Burge* v. *Callaway*, M. T. 1819, Ex., 7 Price, 677; S. P. *Clymer* v. *Littler*, M. T. 1761, K. B., 1 Blac. 345).

† Judgment in ejectment confers no title upon the party in whose favour it is given; and is not evidence in a subsequent action, even between the same parties. From these circumstances it is manifest that the judgment can never be final, and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action. Where, on a former ejectment by the defendant against the plaintiff, who had become tenant under a party tenant in tail, and since deceased, the latter failed in his defence, being held estopped from contesting the title of his landlord, and he afterwards brought an ejectment to recover a different part of the estate, but held under the same title:—Held, that it was within the rule, that the costs of the former ejectment must be first paid before proceeding with his own cause. (*Doe* v. *Shadwell*, H. T. 1839, B. C., 7 D. P. C. 527. See post, 567, as to staying proceedings till costs of first action paid).

The Court, thinking such proceeding not to be a compliance with the undertaking, allowed the lessor of plaintiff to sue out execution against the casual ejector.

ROE *d.* DURANT *v.* MOORE, M. T. 1830. C. P. 1 *D. P. C.* 203; S. C. 4 *M. & P.* 761; S. C. 7 *Bing.* 124.

On error brought, although security has been given under 1 Geo. 4, c. 89, s. 1, still the provisions of the 3rd sect. must be complied with*.

IN ejectment, the defendant had entered into the common undertaking, and also into the undertaking required by the 1 Geo. 4, c. 87, s. 1, to give the plaintiff judgment of the term preceding the trial, in case the verdict should pass for him, and had entered into the recognizance, (as required by that act), with two sureties, to pay the damages and costs. A writ of error was sued out, tested on the 10th of August, (the day of the trial), and allowed and served on the 11th. On the 12th, the defendant entered into a recognizance (his own recognizance only) to prosecute the writ of error in conformity with the provisions of the 16 & 17 Car. 2, c. 8. On the 18th August the plaintiff's agent took out a summons, for the defendant to shew cause why execution should not issue notwithstanding the writ of error; and an order was made by Mr. Justice *Gaselee*, upon the hearing on the 26th of the same month, requiring the defendant, within ten days, to become bound to the plaintiff, with two sufficient sureties, in the sum of 300*l.*, with conditions conformable to the provisions for staying execution, on bringing writs of error upon judgments in actions of ejectment, under the 16 & 17 Car. 2, c. 28, (as required by the 3rd section of the 1 Geo. 4, c. 87); and that, in default thereof, a writ of habere facias possessionem should issue. No such recognizance having been entered into in obedience to this order, the plaintiff executed the writ of habere facias possessionem. On a rule calling upon the lessor of the plaintiff to shew cause why the above order of Mr. Justice *Gaselee*, and the writ of habere facias possessionem, should not be set aside, and the possession restored to the defendant—

The Court held that the defendant could not, by a writ of error, discharge his undertaking (under the 1 Geo. 4, c. 87, s. 1) to give the plaintiff judgment of the term preceding the trial, and his recognizance (under s. 3) not to commit waste &c., without entering into the further recognizance, with two sureties, as required by the 3rd section of that statute.

XXXIII. RELATIVE TO SETTING ASIDE AND STAYING PROCEEDINGS.

DOE *d.* MAYHEW *v.* ASBY, E. T. 1839. Q. B. 2 *P. & D.* 302; S. C. 10 *Ad. & E.* 71.

The Court cannot interfere to

IN ejectment, brought to recover possession of certain premises of which the defendant had been the lessee, and which he had for-

* Where the landlord entered into a consent-rule in several actions, (treating them as consolidated, but on several demises, and varying the number of messuages), which the lessor of plaintiff treated as a nullity, and signed judgment against the casual ejector, upon which a writ of error coram nobis, describing the cause in the same manner, was sued out:—Held, that the judgment was properly signed, and that the writ of error sued out in the name of the casual ejector was to be taken to be at the instance of a proper party until set aside. (*Doe* d. *Faithful* v. *Roe*, T. T. 1839, B. C., 7 D. P. C. 718).

stay proceedings on a forfeiture by breach of covenant.

feited by non-performance of a covenant to repair and insure.—On the 17th of March, 1837, the lessor of the plaintiff caused to be served on the lessee a notice to the following effect: "I herewith send you a formal notice to repair and insure the premises you now hold according to your covenant. You will, of course, take heed of this notice, as I shall avail myself of any legal remedy, on the fact of your not complying with this request; and I think it best to speak thus plainly, and, though apparently harshly, yet in fact kindly, as it is for your interest." The defendant did not repair within the time limited; and ejectment was then brought, a verdict was obtained, and judgment given. In the mean time, but after the limited period had expired, repairs had been done to a considerable extent; the defendant then obtained a rule to shew cause why the judgment entered for the plaintiff should not be set aside, on payment to him of the costs of the action and of the rule.

The Court has no jurisdiction to interfere equitably between the parties in an action of ejectment, and so to prevent the judgment in a forfeiture incurred by the non-performance of a covenant to repair.

DOE *d.* HEIGHLEY *v.* HASLAND, T. T. 1839. Q. B. 10 *Ad. & E.* 761; *questioning* DOE *d.* TAYLOR *v.* HARRIS, T. T. 1829. K.B. 4 *M. & Ry.* 569.—S. P. DOE *v.* LANGDON, M. T. 1833. K.B. 2 *N. & M.* 848.

A second ejectment will be stayed until the costs of the first are paid*;

ON a motion to stay proceedings in a second ejectment until the costs of the former should be paid, the second being by the heir-at-law of the lessor of plaintiff in the first action—

The Court granted the rule, and said the circumstance of the father having been discharged under the Insolvent Act whilst under an attachment for non-payment of the costs, did not vary the case, the discharge being no actual satisfaction.

DOE *d.* REES *v.* THOMAS, E. T. 1836. K. B. 4 *Ad. & E.* 348.

and that rule applies to the claimant who sues after the lessor's death.

AFTER two verdicts obtained in ejectment by the father of the lessor, but in a third action the defendants succeeded upon the same title, and taxed the costs, which had never been demanded nor paid, and the son after his father's death commenced an action against the same defendants—

The Court held, that they were within the ordinary rule, and entitled to a stay of proceedings until the former costs were paid.

* Where the same title was to be brought in question, although by deaths the parties had changed, the Court held it within the rule for staying proceedings, in the second ejectment, until the costs of a former one had been paid; and the devisee of the former defendant is entitled to make the application, and the affidavit may be intitled in the name of the casual ejector. (*Doe* d. *Mudd* v. *Roe*, E. T. 1840, B. C., 8 D. P. C. 444). But where the defendant in ejectment having failed brought trespass against the lessor of the plaintiff for seizing goods on the premises, and was nonsuited, but obtained a rule for a new trial, the Court refused to stay proceedings on such rule until the costs in the ejectment had been paid. (*Carnaby* v. *Welly*, M. T., 1838, B. C., 7 D. P. C. 315).

DOE *d.* STANDISH *v.* ROE, M. T. 1833. K. B. 2 *N. & M.* 468.

THE lessor of the plaintiff, Thomas Standish, brought ejectment, and at the trial he withdrew the record. In the following Michaelmas Term, the defendant obtained a rule nisi for judgment as in case of a nonsuit, which was discharged upon an undertaking to try the cause at the next Assizes. The record was accordingly again entered, but was again withdrawn. The defendant's taxed costs on the occasion of the former entry for trial amounted to 32*l.* 10*s.*, and on the latter entry to 397*l.* 10*s.* On the 2nd January, 1821, Thomas Standish took the benefit of the Insolvent Debtors' Act, having inserted these costs in the schedule of his debts.

Denman, C. J.—We are of opinion that the rule does apply to the assignees of an insolvent debtor. Proceedings in the second ejectment will therefore be stayed until the costs of the first are paid.

And where the lessor in ejectment took the benefit of the Insolvent Act, and then brought a second action, the Court stayed proceedings until the costs of the first were paid.

DOE *d.* TAYLOR *v.* HARRIS, T. T. 1829. K. B. 4 *M. & R.* 569.

A SECOND ejectment was brought by the heir against other parties in possession of other parts of the premises devised.

The Court refused to stay proceedings until the costs of the former were paid, although it was sworn that the action was brought upon the same title to raise the same questions as to the validity of the will and codicil under which the several defendants in each action claimed, the parties and premises being different.

But, proceedings will not be stayed in second action until costs of first paid, where brought for different part of premises under the same devise.

DOE *d.* GRUBB *v.* GRUBB, E. T. 1826. K. B. 5 *B. & C.* 457.

A TITLE to lands descended to the lessor of plaintiff from his father, in 1812, who had not been in possession since 1805; and an ejectment was brought in 1817, in which the defendant J. G. was admitted to defend as landlord, but died abroad in 1825, pending a bill filed for discovery, leaving his brother devisee of all his real estates, and the Statute of Limitations would therefore have been a bar to a fresh ejectment.

The Court, considering that the plaintiff had not been guilty of any wilful delay in prosecuting his claim, granted a rule for signing a judgment against the casual ejector, unless the devisee or the tenant in possession would appear and defend the action.

Where proceedings are stayed by a suit pending in equity, the Court will grant a rule for judgment, however long the interval, and although the Statute of Limitations would be a bar.

DOE *d.* SMITH *v.* HARDY, M. T. 1835. Ex. 4 *D. P. C.* 356.

AN application was made to stay the proceedings in this ejectment. It was the last day of term.

Per Cur.—Proceedings cannot be stayed on the last day of term.

The motion to stay cannot be made the last day of term.

DOE *d.* MARTIN *v.* PACKER, H. T. 1834. Ex. 2 *C. & M.* 457; S. C. 2 *D. P. C.* 373; S. C. 4 *Tyrw.* 144.

IN ejectment, a rule had been obtained to stay the proceedings until the costs of a former ejectment of an action for mesne profits had been paid by the lessor of the plaintiff. It appeared from the affidavits, that, in the former action of ejectment, in which the present demandant was lessor of the plaintiff, judgment had been

And, where a second ejectment is brought, without paying the costs of the

first, and notice of trial given in December for the Spring Assizes, it is not too late to apply to stay proceedings on the 5th day of H. T.

signed against the casual ejector and possession given of the premises on the 29th of July, 1833. The present defendant afterwards brought an action for mesne profits, which was still pending, and issue having been joined in the present action on the 17th of September, on that day notice of trial was given for the next Berkshire Assizes.

Bayley, B.—In my opinion, the defendant has not come too late, and is not prevented by the notice from making this application. The venue is in Berkshire, and notice of trial was given on the 3rd of December,—a period of time, when the only object could be that of preventing the present application. Upon the question, whether the declaration in the former ejectment was regularly served, the proper period to make any objection was while the action was pending: no application however was made on the ground of irregularity, but the then lessor of the plaintiff was put into possession of the premises. Under the circumstances of this case, we are all of opinion, that there is no reason for excepting the defendant from the operation of the rule, and allowing him to proceed with this action before he has paid the former costs.

XXXIV. RELATIVE TO THE REMOVAL OF ACTION OF*.

Election†.

I. OF PERSONS.

(*a*) In general. See tits.

Bankrupt,
Churchwardens,
Constable,
Corporation,
Office and Officer,
Overseer,
Sheriff.

(*b*) To serve in parliament.

1. *As to the Electors.*

1st.—*Qualification of*, p. 573.

2nd.—*Who entitled to vote*, p. 574.

2. *As to Bribery and Treating at Elections*, p. 574.

3. *As to contested and controverted Elections*, p. 577.

* An ejectment brought in an inferior jurisdiction is not within 19 Geo. 3, c. 70, s. 4, and cannot, therefore, be removed upon the defendant's quitting such jurisdiction. (*Doe* d. *Stanfield* v. *Shipley*, M. T. 1833, B. C., 2 D. P. C. 408).

† As the law of elections is entirely altered by the 2 Will. 4, c. 45, an abstract of the statute may be useful. By

Sect. 1. Certain boroughs to cease to send members to Parliament.

Sect. 2. Certain boroughs to return one member only.

Sect. 3. New boroughs hereafter to return two members.

Sect. 4. New boroughs hereafter to return one member.

Sect. 5. The boroughs of Shoreham, Cricklade, Aylesbury, and East Retford, to include certain adjacent districts.

I. OF PERSONS—(*continued*).

4. *Actions connected with.*

1st.—*Declaration*, p. 582.

2nd.—*Pleas*, p. 583.

3rd.—*Evidence*, p. 583.

5. *Indictments connected with*, p. 583.

II. CONNECTED WITH PROPERTY. See tits.

Copyhold Estates,	*Legacy,*
Executor and Administrator,	*Marriage,*
Heir,	*Rent,*
Husband and Wife,	*Tenant for Life,*
Infant,	*Tenant in Tail.*

Sect. 6. Weymouth and Melcombe Regis to return two members only. Penryn includes Falmouth and Sandwich, Deal and Walmer.

Sect. 7. Boundaries of existing boroughs in England to be settled.

Sect. 8. Places in Wales to have a share in elections for the shire towns.

Sect. 9. Boundaries of shire towns and places in Wales to be settled.

Sect. 10. Swansea, Longhor, Neath, Aberavon, and Ken-fig, to form one borough, and electors thereof not to vote for a member for Cardiff.

Sect. 11. Description of the returning officers for the new boroughs: who disqualified, who exempt; proviso.

Sect. 12. Six knights of the shire for Yorkshire; two for each riding.

Sect. 13. Four knights of the shire for Lincolnshire; two for the parts of Lindsey, two for Kesteven and Holland.

Sect. 14. Certain counties to be divided, and to return two knights of the shire for each division.

Sect. 15. Certain counties to return three knights of the shire.

Sect. 16. Isle of Wight, severed from Hampshire, to return a member.

Sect. 17. Towns, which are counties of themselves, to be included in adjoining counties for county elections.

Sect. 18. Limitation on the right of voting for counties and cities, being counties of themselves, in respect of freeholds for life.

Sect. 19. Right of voting in counties extended to copyholders.

Sect. 20. Right of voting in counties extended to leaseholders and occupiers of premises of certain value above charge.

Sect. 21. What is not to be deemed charges.

Sect. 22. County voters need not be assessed to the land-tax.

Sect. 23. Provision as to trustees and mortgagees.

Sect. 24. No person to vote for a county in respect of any freehold house, &c., occupied by himself, which would confer a vote for a borough.

Sect. 25. No person to vote for a county in respect of certain copyholds and leaseholds in a borough.

Sect. 26. Possession for a certain time and registration essential to a right of voting for a county. Exception in case of property coming by descent, &c.

Sect. 27. Right of voting in boroughs to be enjoyed by occupiers of houses, &c., of the annual value of 10*l.* No occupier to vote unless rated to the poor-rate. Rate and assessed taxes must be paid. Residence also required.

Sect. 28. Provisions as to premises occupied in succession.

Sect. 29. As to joint occupiers.

Sect. 30. Occupiers may demand to be rated.

Sect. 31. Provisions as to freeholders voting for cities and towns, being counties of themselves. To extend to freeholds within the new boundaries.

Sect. 32. Freemen not to vote in boroughs unless resident, &c. Exclusion of freemen created since the 1st March, 1831. Exception. Provision as to the freemen of Swansea, Longhor, Neath, Aberavon, and Ken-fig.

Sect. 33. Reservation of other rights of voting in boroughs. Residence, &c. required.

Sect. 34. Provision as to persons now entitled to vote for New Shorcham, Cricklade, Aylesbury, or East Retford, in respect of freeholds.

Sect. 35. Exclusion of certain rights of voting in boroughs required since the 1st of March, 1831.

Sect. 36. As to receipt of parochial relief.

Sect. 37. Overseers to give notice annually requiring county voters to send in their claims. Persons once on the register not required to make any claim.

Sect. 38. Overseers to prepare lists of county voters, and to publish them every year. Overseers to have power of objecting to any name inserted in the lists, to keep copies of lists for inspection. Provision as to places having no overseers.

Sect. 39. Notice of objection by third parties to persons not entitled to be retained in the county lists. Lists of persons objected to by third parties to be published, &c.

Sect. 40. Lists of county voters to be forwarded to the clerks of the peace.

Sect. 41. Judges of assize to name barristers, who shall revise the lists of county voters Period for revision.

Sect. 42. Clerk of the peace and overseers to attend before the barristers, who shall retain on the county lists all names not objected to, and shall expunge those whose qualifications, if objected to, shall not be proved. Power to rectify mistakes and supply omissions in the lists. Proviso, &c.

Sect. 43. Barrister to have power to insert in the county lists the names of claimants, omitted by the overseers, on proof of claim and qualification.

Sect. 44. Overseers to prepare lists of persons, (other than freemen), entitled to vote in boroughs and to publish them. Copies of lists to be kept for inspection.

Sect. 45. Provision for places within boroughs having no overseers.

Sect. 46. Town clerks to prepare and publish the lists of freemen.

Sect. 47. Persons omitted in the borough lists to give notice of their claims. Notices as to persons not entitled to be retained in the lists. Lists of claimants and of persons objected to, to be published, &c.

Sect. 48. List of liverymen of London to be transmitted to the returning officer. Notices to be given of omissions and objections in lists of liverymen. Poll of liverymen to be taken at Guildhall.

Sect. 49. Judges of assize to name barristers who shall revise the lists of borough voters. Proviso.

Sect. 50. Barristers to revise lists of borough voters, and, upon due proof, to insert and expunge names. Power to rectify mistakes and supply omissions in the lists.

Sect. 51. Power of inspecting tax assessments and rate-books.

Sect. 52. Barrister, on revising the lists, to have power of adjourning, of administering oaths, &c., and to settle and sign the lists in open court.

Sect. 53. Judges to appoint additional barristers in case of need.

Sect. 54. County lists to be transmitted to clerk of the peace, borough lists to be kept by returning officer, and handed to his successor. Lists to be copied into books, with the names numbered. Such books to be the register of electors. Register, how long to be in force.

Sect. 55. Copies of the lists and the registers to be printed for sale.

Sect. 56. Expenses of overseers, clerks of the peace, &c., how to be defrayed.

Sect. 57. Remuneration of the barristers for revising the lists.

Sect. 58. No inquiry at the time of election, except as to the identity of the voter, the continuance of his qualification, and whether he has voted before at same election. Form of questions as to these points. Oath to be administered if required. Form of oath. No other oath as to qualification. No scrutiny by returning officer.

Sect. 59. Persons excluded from the register by the barrister may tender their votes at elections. Tender to be recorded.

Sect. 60. Correctness of the register to be questionable before a committee of the House of Commons.

Sect. 61. Sheriffs of the divided counties to fix the time, and preside at elections.

Sect. 62. Commencement and continuance of polls at county elections.

Sect. 63. Counties to be divided into districts for polling.

Sect. 64. As to booths at the polling-places for counties. No voter to poll out of the district where his property lies.

Sect. 65. Provision as to sheriff's deputies, the custody of poll-books, and final declaration of the poll for counties.

I. OF PERSONS.

(*b*) To serve in parliament.

1. *As to the Electors.*

1st.—*Qualification of*.*

Sect. 66. Sheriffs in county elections may act in places of exclusive jurisdiction.

Sect. 67. Commencement and continuance of polls at borough elections in England.

Sect. 68. Polling for boroughs in England to be at several booths, not more than 600 voting at one compartment in a booth. Each person to vote at the booth appointed for his parish or district. If the booths are in different places, a deputy to preside at each place. As to custody of poll-books, and final declaration of poll for boroughs.

Sect. 69. Polling districts to be appointed for Shoreham, Cricklade, Aylesbury, and East Retford.

Sect. 70. When returning officers may close the poll before the expiration of time fixed. Adjournment of poll in case of riot.

Sect. 71. Candidates, or persons proposing a candidate without his consent, to be at the expense of booths and poll-clerks. Limitation of expense. Houses may be hired for polling in, instead of booths.

Sect. 72. Certified copies of the register of voters for each booth.

Sect. 73. Powers of deputies of returning officers.

Sect. 74. Regulations respecting polling, &c., for the borough of Monmouth, and for the contributory boroughs in Wales. As to appointment of deputies in Wales.

Sect. 75. All election laws to remain in force, except where superseded by this act.

Sect. 76. Penalties on officers for breach of duty.

Sect. 77. Writs, &c., to be made conformable to this act.

Sect. 78. This act not to extend to the universities of Oxford and Cambridge.

Sect. 79. Of the sense in which words in this act are to be understood: "city or borough," "returning officer," "parish or township," "overseers of the poor," "justices of the peace for counties," &c. Misnomer not to vitiate.

Sect. 80. In case the proposed Boundary Act shall not pass before the 20th of June, 1832, the preparations for first registrations to be deferred; but if the Boundary Act pass after that day, the periods preparatory to and connected with the first registrations to be settled by an order in council. Proviso.

Sect. 81. In case of a dissolution of Parliament after the passing of the proposed Boundary Act, and before registration, the rights of voting shall take effect without registration.

Sect. 82. In case of a dissolution of Parliament before the passing of the proposed Boundary Act, counties not to be divided; boundaries of new boroughs defined; boundaries of old boroughs to remain; and the rights of voting to take effect without registration.

* See the 2 Will. 4, c. 45, ante, p. 570, and 1 & 2 Vict. c. 48.

Sect. 1. Repeals the 9 Anne, c. 5, and 33 Geo. 2, c. 20.

Sect. 2. Qualification of members.

Sect. 3. Candidates at elections to make the declaration contained in this clause, if required.

Sect. 4. Before whom declaration to be made. Declaration to be certified, under penalty.

Sect. 5. Fees for administering and filing declaration.

Sect. 6. Every member to deliver in at the table of the house a statement of qualification, and make declaration. Form of declaration.

Sect. 7. False declaration deemed a misdemeanor.

Sect. 8. Election void, if member sits or votes before he has complied with the provisions of the act.

Sect. 9. Not to extend to the members for the universities, nor to the eldest sons of peers.

Sect. 10. Act may be amended.

2nd.—*Who entitled to vote*.*

GOODAY *v.* CLARK, T. T. 1835. Ex. 2 *C., M. & R.* 272.

Whether the keeper of an excise office is entitled to vote under 7 & 8 Geo. 4, is undecided.

IN debt, on the 7 & 8 Geo. 4, c. 53, for penalties, the only evidence against the defendant was that he kept an inn, over the door of which was a board, with the words "excise office" painted on it; that his vote, being objected to before the revising barrister in October, 1834, and his commission being called for, he had produced what the witnesses described as "something framed and glazed like a picture;" that he had received entries of buildings before the passing of the 4 & 5 Will. 4, c. 15, (August, 1834), but had since ceased to do so; and a witness stated that he had seen the defendant's commission, which was partly written and partly printed, and appointed him to collect duties of excise.

The Court held, 1st, that this was not evidence to go to the jury, that, on the 19th of January, 1835, when the defendant voted at the election, he was an officer of excise; but, 2ndly, doubted whether such a person was entitled to vote if he really were a keeper of an excise office.

REGINA *v.* PEPPER, M. T. 1839. Q. B. 7 *Ad. & E.* 745; S. C. 3 *N. & P.* 155.

A revising barrister striking a freeman's name off the list does not disqualify him as a member of the corporation.

THE name of a freeman of a borough had been struck off the roll of electors for members of Parliament by the revising barrister, he not appearing to possess any corporate property—

The Court held that quo warranto did not lie against him. The mere unsuccessful claim to the franchise, or possibility that it might be renewed with success, are not equivalent to that actual usurped possession which the information on a quo warranto supposes.

In re JONES, H. T. 1835. K. B. 4 *N. & M.* 340; S. C. 2 *Ad. & E.* 436.

An habeas corpus will not lie to bring up a person to enable him to vote.

ON motion for a habeas corpus to bring up the body of Jones, who was in the custody of the sheriff of Hereford, under sentence of imprisonment for a misdemeanor, upon an affidavit which stated that he was a freeholder of the county of Radnor, and was desirous of being allowed to go to give his vote at the poll expected to be taken on the 17th instant—

Lord *Denman*, C. J.—We think that there is no foundation for this motion.

---

2. *As to Bribery and Treating at Elections.* See also ante, tit. *Bribery*†.

HARDING *v.* STOKES, E. T. 1836. Ex. 2 *M. & W.* 283.

It is for the jury to say

IN an action of debt, the declaration for penalties under 5 & 6 Will. 4, c. 76, (Municipal Corporations), charged the offence as a

* Under the 2 & 3 Will. 4, c. 45, (Reform Act), to entitle a party on the register to vote, the identity of the qualification must continue; but where the voter possessed a qualification ejusdem generis, which he had changed since the registry, and acted bonâ fide, and under the opinion of others conversant with the law:—Held, that he could not be convicted of the misdemeanor. (*Regina* v. *Dodsworth*, 1838, N. P., 8 C. & P. 218).

† By 2 Geo. 2, c. 24, s. 4, it is enacted, "That if any person who shall have a claim to have any right in any election of any member to serve in Parliament

corrupting the voter, and the evidence established only an offering to corrupt.

whether it was corruption of a voter, or the offer to corrupt.

The Court held, that it was for the jury to say whether it was an offer accepted or not, as in the former case the offence would have

shall ask, receive, or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or refuse or forbear to give his vote in any such election; or if any person, by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any persons to give his or their vote or votes in any such election, such persons so offending in any of the cases aforesaid shall, for every such offence, forfeit 500*l.* And further, that such offender, after judgment against him in any action or information, or summary action or prosecution, or being otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member to serve in Parliament, and to hold any office or franchise, as if such person was naturally dead." Before the passing of that act, by 7 & 8 Will. 3, c. 7, it was enacted, "That if any person should make or give any contract, promise, bond, or security, or any gift or reward, to procure a false or double return of any member to serve in Parliament, he should forfeit the sum of 300*l.*; one third to the King; one-third to the poor of the county, city, borough, or place concerned; the remaining third to the person who should sue for the same by action of debt, bill, plaint, or information." But a recent statute, 49 Geo. 3, c. 118, after reciting that the giving money, &c., in order to procure the return of a member to Parliament, if not given to or for the use of some person having a right, or claiming to have a right to act as returning officer, or to vote at the election, is not bribery within the former statute, 2 Geo. 2, c. 24, enacts, "That if any person shall give, or cause to be given, directly or indirectly, or promise or agree to give, any money, gift, or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf such gift or promise shall be made, shall, by himself, or by any other, at his request or command, procure, or endeavour to procure, the return of any person to Parliament for any place, he shall, if not returned himself to Parliament for such place, for every such gift or promise forfeit 1000*l.*; and if returned, and having given, or promised to give, and knowing of and consenting to such gifts or promises, shall be disabled and incapacitated to serve in that Parliament for such place, and shall be as if he had never been returned or elected a member of Parliament." And it enacts also, "That any person who shall receive or accept of, by himself or by any other, to his use, or on his behalf, any such money, gift, or reward, or any promise upon any such engagement, contract, or agreement, shall forfeit the value and amount of such money, gift, or reward, over and above the sum of 500*l.*" By sect. 2 it is enacted, "That if any person shall, by himself, or by any other, give, or promise to give, or procure to be given, any office, place, or employment, upon any express contract or agreement that the person to whom, or to whose use, or on whose behalf, such gift or promise shall be made, shall, by himself, or by any other, at his request or command, procure, or endeavour to procure, the return of any person to Parliament for any place, such person so returned, and so having given, or procured to be given, or promised to give or procure to be given, or knowing of and consenting to such gift or promise upon any such express contract or agreement, shall be disabled and incapacitated to serve in that Parliament for such place, and be deemed no member of Parliament, and as if he had never been returned; and any person who shall receive or accept of, by himself, or by any other, to his use, or on his behalf, any such office, place, or employment, upon such express contract or agreement, shall forfeit such office, &c., and be incapacitated from holding the same, and shall forfeit 500*l.*" And it further enacts, "That any person holding any office under his Majesty who shall give such office, appointment, or place, upon any such express contract or agreement that the person to whom, or for whose use such office, &c., shall have been given, shall so procure, or endeavour to procure, the return of any person to Parliament, shall forfeit 1000*l.*" And by 4 & 5 Vict. c. 57, it is enacted, "That whenever any charge of bribery shall be brought before any select committee of the House of Commons, appointed to try and determine the merits of any return or election of a member or members to serve in Parliament, the committee shall receive evidence upon the whole matter whereon it is alleged that bribery has been committed; neither shall it be necessary to prove agency in the first instance, before giving evidence of those facts whereby the charge of bribery is to be sustained; and the committee, in their report to the House of Commons, shall separately and

been committed; but that, if not, and the voter had not made up his mind, then the offence would be a mere offer to corrupt, within the 3rd section of the act.

MARSH *v.* COPPOCK, 1840. N. P. 9 *C. & P.* 480.

In debt for bribery, one of the jury being a tenant of the brother of the candidate is not a ground of challenge.

IN debt, for penalties for bribery at the election of members of Parliament for L., to be tried by a special jury, each party having given a list to the associate of the talesmen, one having desired not to be called, in the event of a tales being prayed, and who being passed over, the panel was insufficient by three; and there being no challenge except for cause, the names were all again put into the box, and upon the first being challenged, as being a tenant of the person whose interest in L. was affected, his brother being one of the candidates—

Williams, J., held the objection not a sufficient cause of challenge, nor that he had been foreman of the jury in a similar cause previously tried.

HUGHES *v.* MARSHALL, M. T. 1831. Ex. 2 *C. & J.* 118; S. C. 2 *Tyrw.* 134; S. C. 5 *C. & P.* 150.

The 7 & 8 Will. 3, c. 4, as to treating, only applies to acts done by the candidate himself, or his authorized agent*.

IN assumpsit, the declaration contained counts for meat, drink, and lodging supplied to the defendants and divers other persons, at their special instance and request; counts for goods sold and delivered to the defendants, and bargained and sold to the defendants, and delivered to divers other persons, &c.; the usual money counts, and a count on an account stated. The defendants pleaded the general issue. A witness stated that, at the election for Shrewsbury in July, 1830, the plaintiff's inn, called the Elephant and Castle, had been opened, after the polling had commenced, by the committee of Mr. Slaney, one of the candidates, for the accommodation of voters in his interest, and that the defendants, who, (tradesmen and voters, and active supporters of Mr. Slaney), during four days of the election, had given orders, either personally or by written tickets, to the plaintiff, for the supply of provisions, ale, wine, &c., to upwards of one hundred of Mr. Slaney's voters, and to some other persons who were not voters, and had also been themselves furnished with refreshments by the plaintiff. It further appeared that the defendants, after the election, had signed the plaintiff's bill for these supplies, amounting to 23*l.* 18*s.* 6*d.*, and for which the action was brought, and acknowledged it to be just. The learned Judge expressed his opinion to the jury that the case would not fall within the Treating Act, (7 & 8 Will. 3, c. 4, s. 1), unless they were satisfied that the defendants were proved to have been agents to or identified with the candidate.

distinctly report upon the fact or facts of bribery which shall have been proved before them, and also, whether or not it shall have been proved that such bribery was committed with the knowledge and consent of any sitting member or candidate at the election."

* Where a party elected died before taking his seat:—Held, that the representation became vacant on his death, and that the plaintiff, a publican, could not recover for beer, &c., supplied to voters on a canvas by a third party, on behalf of a candidate at the following election, although the latter neither ordered nor was shewn to have knowledge of the treating:—Held, also, that the Treating Act was not confined merely to successful candidates. (*Ward* v. *Nanney*, 1828, N. P., 3 C. & P. 399).

The Court held, that provisions and entertainments given to voters at an election are not within the Treating Act, (7 & 8 Will. 3, c. 4, s. 1), if not supplied by the direction of the candidate or his authorized agents; consequently, an innkeeper may maintain an action against parties, not the authorized agents of a candidate, for entertainment and provisions furnished on their credit to voters in the interest of such candidate.

THOMAS *v.* EDWARDS, T. T. 1837. Ex. 2 *M. & W.* 215; S. C. 1 *T. & G.* 872.

THE defendant was proved to have acted as chairman of the committee of an election for a candidate; and a party offering his services to the committee was afterwards, at a meeting of the partizans, informed that his duties were to be in regulating the supply of refreshments at different public-houses, and he was furnished with a list and directions, and the agent arranged with the plaintiff's testatrix and others; but he could not prove that the defendant was present at such meeting, although he afterwards told the agent, if he met with any difficulty to come to him.

To render the chairman of a committee liable, it must be shewn that he authorized his agent to give the order for refreshments, &c.;

The Court held, that, to fix the defendant personally, the plaintiff was bound to prove that such agent was either employed by the defendant *alone*, or by the defendant and others, to give such orders, and that the defendant was not himself acting as agent for others, or that the agent was a principal jointly with the defendant and others; and that it was immaterial whether the plaintiff considered the agent as making the contract in behalf of the candidate, if he was not in fact so authorized.

THOMAS *v.* HARRIES, 1834. N. P. 6 *C. & P.* 615.

IN an action for goods sold—

Per Parke, B.—If a person who is not himself a candidate, and who is not known to the party who supplies the refreshments to be the agent of a candidate, open a public-house at an election, and order supplies for the voters, he is personally liable to pay; and the stat. 7 & 8 Will. 3, c. 4, (commonly called the Treating Act), will afford him no defence, provided that the goods were furnished entirely on the credit of the person who so ordered them.

but a person not a candidate, nor known to be an agent of one, is personally liable, if he orders goods to be supplied to electors.

---

3. *As to Contested and Controverted Elections.*

MUNTZ *v.* STURGE, E. T. 1841. Ex. 8 *M. & W.* 302.

BY the 2 Will. 4, c. 45, s. 68, it is enacted, "That at every contested election, &c., the returning officer shall, if required thereto by or on behalf of any candidate, on the day fixed for the election, and if not so required may, if it shall appear to him expedient, cause to be erected, for taking the poll at such election, different booths," &c.; and the 71st section provides, "that all booths shall be erected at the joint and equal expense of the several candidates."

The words in the 2 Will. 4, c. 45, "contested election," means the poll, and those who go to the poll.

The Court held, that the "contested elections" referred to in the 68th section is the poll; and the candidates referred to in the 71st are candidates who go to or demand a poll.

FECTOR *v.* BEACON, H. T. 1839. C. P. 5 *Bing. N. C.* 302; S. C. 7 *D. P. C.* 265.—S. P. GORDON *v.* GURNEY, H. T. 1832. C. P. 9 *Bing.* 37.

Before 4 & 5 Vict. c. 58*,

A PETITION, complaining of the return of a member to serve in Parliament, had been declared by the committee frivolous and vexa-

* The 4 & 5 Vict. c. 58, by sect. 1, repeals the 2 & 3 Vict. c. 38.

Sect. 2. Suspension of 9 Geo. 4, c. 22, and part of 42 Geo. 3, c. 106, and 47 Geo. 3, c. 14.

Sect. 3. What shall be deemed election petitions.

Sect. 4. Recognizance to be entered into by petitioners.

Sect. 5. Sureties to make affidavits of sufficiency, and to be described.

Sect. 6. Examiner of recognizances to be appointed.

Sect. 7. Provision for temporary disability of examiner.

Sect. 8. How recognizances are to be entered into.

Sect. 9. Option of paying money into the Bank instead of finding surety.

Sect. 10. Declaration of trust.

Sect. 11. No petition to be received unless indorsed by the examiner of recognizances.

Sect. 12. Names of sureties to be kept in the office of the examiner of recognizances.

Sect. 13. Sureties may be objected to.

Sect. 14. Notice of objections to be published in the office of the examiner, and copies may be taken.

Sect. 15. Examiner of recognizances to decide on the objections.

Sect. 16. In case of death of a surety, the money may be paid into the Bank.

Sect. 17. Examiner of recognizances to report whether or not sureties are objectionable.

Sect. 18. How petitions may be withdrawn.

Sect. 19. Proceedings when the seat becomes vacant, or the sitting member declines to defend his return.

Sect. 20. Voters may become a party to oppose the petition.

Sect. 21. Members having given notice of their intention not to defend shall not be admitted as parties.

Sect. 22. At the beginning of every session, the speaker to appoint a general committee.

Sect. 23. If the house disapprove the first appointment, a new appointment to be made.

Sect. 24. Disapproval may be general or special.

Sect. 25. Members not disapproved of by the house may be again named in the warrant.

Sect. 26. For what time the appointment shall be.

Sect. 27. Cases of vacancy to be made known to the house, and proceedings suspended.

Sect. 28. Cases in which the general committee shall be dissolved.

Sect. 29. How vacancies shall be supplied, and re-appointments made.

Sect. 30. Election petitions to be referred to the general committee.

Sect. 31. Provisions for cases where more than one petition.

Sect. 32. House to fix the time and place of first meeting of committee. General committee to be sworn.

Sect. 33. Numbers necessary to enable the committee to act.

Sect. 34. Committee to regulate their own proceedings.

Sect. 35. Clerk to keep minutes of the proceedings, to be laid before the house.

Sect. 36. During any suspension, the speaker may adjourn any business before the general committee.

Sect. 37. Members wholly excused from serving.

Sect. 38. Names of members claiming to be excused to be called over.

Sect. 39. Members temporarily excused from serving.

Sect. 40. Members temporarily disqualified from serving.

Sect. 41. A corrected list, distinguishing the excused or disqualified members, to be printed and distributed with the Votes.

Sect. 42. List may be further corrected during one week.

Sect. 43. Selection of members to serve as chairman of election committees.

Sect. 44. List to be divided into five panels.

tious, and the Speaker had issued his certificate for the amount and payment of costs under the 9 Geo. 4, c. 22. under the stat. 9 Geo. 4, c. 22,

Sect. 45. General committee to correct the panels from time to time.
Sect. 46. Power to transfer to another panel the names of members obtaining leave of absence.
Sect. 47. For supplying vacancies, and increasing the chairman's panel.
Sect. 48. Members upon chairman's panel to make regulations.
Sect. 49. General committee to determine how many committees shall be chosen in such week. Notice to be given when any committee will be chosen.
Sect. 50. Notice of petitions and panels.
Sect. 51. Provision for cases where the sitting member does not defend, and some party has been admitted to defend, &c.
Sect. 52. General committee empowered to change the day for choosing select committee.
Sect. 53. List of voters intended to be objected to shall be delivered to the clerk of the general committee.
Sect. 54. Select committee to be chosen.
Sect. 55. In case of disagreement, the general committee to adjourn. Committees to be chosen for petitions according to their order on the list.
Sect. 56. When committee chosen, the parties to be called in.
Sect. 57. General committee to proceed in order with all the petitions appointed for that day.
Sect. 58. Parties may object to disqualified members. If general committee allow the disqualification, a new committee to be chosen.
Sect. 59. Notice to be sent to every member chosen.
Sect. 60. If any member chosen proves disqualification, another committee to be chosen.
Sect. 61. Members on chairman's panel to appoint chairman to select committees.
Sect. 62. Select committee to be reported to the house.
Sect. 63. Members of select committee to be sworn.
Sect. 64. Members of said committee not present within one hour after meeting of the house to be taken into custody by the serjeant-at arms.
Sect. 65. If any such member is not present within three hours after the meeting of the house, the proceedings to be adjourned.
Sect. 66. All the members not attending after adjournment, the committee to be discharged.
Sect. 67. Petitions and lists to be referred to the committee, and time and place of meeting to be appointed by the house.
Sect. 68. Casting vote in the election of a chairman.
Sect. 69. Committees not to adjourn for more than twenty-four hours, without leave, &c.
Sect. 70. Committee-man not to absent himself. Committee not to sit until all be met; on failure of all meeting within one hour to adjourn.
Sect. 71. Absentees to be directed to attend the house.
Sect. 72. If any committee is reduced to less than six by the non-attendance of its members, it shall be dissolved, except as herein mentioned.
Sect. 73. Committee to be attended by a short-hand writer.
Sect. 74. Committee empowered to send for and examine persons, papers, and records. Witnesses misbehaving may be reported to the house, and committed to the custody of the serjeant-at-arms.
Sect. 75. How oaths to be administered.
Sect. 76. Giving false evidence to be perjury.
Sect. 77. Evidence to be confined to objections particularized in the lists.
Sect. 78. Committee to decide, and to report their decision to the house.
Sect. 79. Committees may report their determinations on other matters to the house.
Sect. 80. When committee is deliberating the room to be cleared, &c.
Sect. 81. Questions to be decided by a majority.
Sect. 82. Names of members voting for or against any resolution to be reported to the house.
Sect. 83. Committees not dissolved by the prorogation of Parliament, &c.
Sect. 84. Costs, when incurred by petitioners, &c.
Sect. 85. Costs, when incurred by parties opposing petitions.
Sect. 86. Costs, when incurred where no party appears to oppose a petition.

the party in whose favour the certificate was granted might proceed against any of the parties, at his election.

The Court held—first, that it was competent to the plaintiff, under the 63rd section of the statute, to demand the costs of any one of the persons made liable by the certificate, and to bring his action against him alone; and, secondly, that the jurisdiction exercised by the Speaker is not be considered as penal in its nature, nor are presumptions to be made against it as such, inasmuch as the authority under which he acts has been given in ease and favour of the defendants; consequently the objections that the plaintiff's name was not mentioned in the requisition to the Speaker, nor in the document signed by the examiners, but was found for the first time in the Speaker's certificate, and that there was no apparent connection between the party whose account was transmitted to the Speaker for taxation, and the petitioners, are unavailing, and could not invalidate the certificate, it appearing aliunde that the plaintiff was the party against whom the petition was presented; and that his costs, and those of the party whose account was transmitted for taxation, were identical; held also, that the Speaker might, under the 60th section, include in his certificate the costs of a voter allowed to defend the return of the sitting member, though the affidavits did not state the exact amount of the costs due to such voter, nor the ground upon which they were included by the examiners, as the section above referred to enacts, "that the Speaker's certificate shall be conclusive evidence of the amount of costs.

RANSON *v.* DUNDAS, H. T. 1837. C. P. 3 *Bing. N. S.* 180; S. C. 3 *Scott*, 497.—S. P. FECTOR *v.* BEACON, H. T. 1839. C. P. 5 *Bing. N. S.* 302; S. C. 7 *D. P. C.* 265.—S. P. GORDON *v.* GURNEY, H. T. 1832. C. P. 9 *Bing.* 37.

The Speaker's certificate is final; there can be no suggestion of facts in answer.

IN this case—

The Court held—first, that the Speaker's certificate being conclusive as to the amount of costs, the Court will not (all proceedings appearing in conformity with the act) inquire whether costs, not strictly and properly occasioned by the opposition of the sitting members against the petition, are included; and, secondly, that, in the taxation, the Court will not allow the defendants to enter a suggestion on the roll of the circumstances under which judgment has

Sect. 87. Costs upon frivolous objections.
Sect. 88. Costs upon unfounded allegations.
Sect. 89. Costs, how to be ascertained.
Sect. 90. Costs occasioned by delay in appointing the select committee to be taxed off.
Sect. 91. Persons appointed to tax costs empowered to take affidavits.
Sect. 92. Recovery of costs.
Sect. 93. Persons paying costs may recover a proportion thereof from other persons liable thereto.
Sect. 94. Recognizances, when to be estreated, &c.
Sect. 95. Returning officer may be sued for neglecting to return any person duly elected.
Sect. 96. Continuance of act, and of proceedings commenced under it.

An agreement to pay a sum in consideration of not proceeding on a petition against the return of a sitting member, on the ground of bribery:—Held illegal; and that the memorandum, although unstamped, was admissible to prove such agreement, the statute applying only to instruments used as evidence of a binding agreement. (*Coppock* v. *Bower*, E. T. 1838, Ex., 4 M. & W. 361).

been allowed to be entered up for the plaintiffs, under the 63rd section of 9 Geo. 4, c. 22, for the purpose of enabling the defendants to take the opinion of a court of error.

BRUYERES *v.* HALCOMB, T. T. 1835. K. B. 5 *N. & M.* 149; S. C. 3 *Ad. & E.* 381.

BY 9 Geo. 4, c. 22, s. 3, it is enacted, "That if the petitioner does not appear by himself or counsel within an hour of that time, the order for taking the petition into consideration is to be discharged." The defendant petitioned against a return, and did not appear within an hour after the time fixed to take the petition into consideration, either by himself, his counsel, or agent; but the committee, nevertheless, proceeded with the petition, and reported it frivolous and vexatious, and the examiners taxed the costs incurred, upon which the Speaker granted his certificate.

The Court refused the application to enter up judgment, as, by the 3rd section of the act, the order on the petition ought not to have been proceeded with.

But the Speaker's warrant cannot be enforced if the certificate be founded on proceedings not in compliance with the act.

RANSON *v.* DUNDAS, H. T. 1837. C. P. 5 *D. P. C.* 489; S. C. 3 *Bing. N. S.* 556; S. C. 1 *Scott*, 429.

JUDGMENT was signed upon the Speaker's warrant under the 9 Geo. 4, c. 22. On motion for costs—

Per Cur.—We think we have no power to give judgment for costs. It is a statutory power given to the Court to enter up a judgment, and the terms of such power must be strictly followed. The certificate by the Speaker is declared to have "the force and effect of a warrant to confess judgment;" and the Court is directed to enter up judgment in favour of the plaintiff "for the sum specified therein to be due from the defendant." This gives an authority expressly to enter up judgment for the very sum mentioned as the amount of the debt. But the clause directs the judgment to be entered up "in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount." Now, the statute cannot be more safely construed than by considering what would be the course of proceeding if the defendant had actually signed a formal warrant of attorney to confess judgment in the action to the amount of the sum mentioned in the Speaker's certificate, and the plaintiff had entered up his judgment under such warrant of attorney; in that case it is the well-known course of practice of the Court, that the warrant of attorney being silent as to costs, the judgment would have been entered up for the sum specified as the debt, and no more.

And in entering up judgment, the statutory power must be strictly pursued, and be for the sum specified in the Speaker's certificate.

In re SCOTT, M. T. 1838. Ex. 4 *M. & W.* 257; S. C. 7 *D. P. C.* 59.

UNDER the 9 Geo. 4, c. 22, ss. 5, 60, and 65, if a petition be presented to the house against the return of a member, and the recognizances on behalf of the petitioner, according to the above act, are entered into, and, on the day appointed for taking the same into consideration, he do not appear to support the petition, the order for taking it into consideration is discharged.

Under 9 Geo. 4, c. 22, s. 60, the Speaker may certify the recognizance forfeited if the parties do not appear.

The Court held, that the Speaker has the power, under the 60th section, to ascertain the amount of costs by taxation, and certify the same to the petitioner for payment; and, upon default of payment, to certify the recognizance of the petitioner and his sureties into the Exchequer as forfeited to the Crown.

MAGRAVE *v.* WHITE, T. T. 1828. K. B. 8 *B. & C.* 412.

The 53 Geo. 3 extends to costs and expenses becoming due from the sitting member as well as the petitioner*.

THE question was, whether, under the 53 Geo. 3, c. 71, (incorporated in 9 Geo. 4, c. 22), a witness summoned on behalf of the sitting member, before an election committee, is entitled to his expenses, and to enter up judgment on the Speaker's certificate, in the same manner as witnesses summoned on behalf of the petition are entitled under that act.

Per Cur.—We think the act of Parliament intended to place the petitioner and the sitting members upon precisely the same footing. The object was to provide a remedy for a mischief which applied to one side as much as to the other—namely, the non-payment of the costs and fees, and of the expenses of the witnesses.

RANSON *v.* DUNDAS, H. T. 1817. C. P. 3 *Bing. N. S.* 123; S. C. 3 *Scott*, 429; S. C. 5 *D. P. C.* 207, 489.

In debt for the costs of a frivolous petition, it is not material that no notice was given to the returning officers to attend at the bar of the house; and the Speaker's certificate is conclusive as to the amount of costs.

IN an action of debt for the costs of a frivolous petition against the return under 9 Geo. 4, c. 22, s. 63—

The Court held, that the omission to give notice to the returning officers to attend at the bar of the house, on the striking of the committee, was of a matter directory only, and not essential to the legal constitution of the committee, the officers having no power of interfering in the choice of the committee; and that the petition being silent in its prayer as to any claim of redress against the returning officers on the ground of misconduct, and only incidentally complaining of impartiality and misconduct, they were not to be deemed parties to the petition, and the report, therefore, not void by reason of omitting to notice the charge against them: held also, that the recognizance entered into being in the prescribed form, it was sufficient that one of several petitioners entered into it in that form; and lastly, that the Speaker's certificate is conclusive as to the amount of costs for which the verdict is to be entered up.

---

4. *Actions connected with.*

1st.—*Declaration*†.

* The rule for entering judgment on the Speaker's certificate, as to the costs of a petitioner, is only nisi in the first instance. (*Bailey* v. *Bond*, M. T. 1839, B. C., 8 D. P. C. 119).

† In an action against an overseer for a penalty under sect. 76 of the Reform Act, 2 Will. 4, c. 45, for wilfully inserting in the list of voters the names of persons not entitled to vote, it is not essential that the defendant should have acted from any corrupt motive, it is sufficient if he has acted wilfully. (*Tarr* v. *M'Gahey*, H. T. 1836, N. P., 7 C. & P. 380).

2nd.—*Pleas.*

JONES *v.* NAINNEY, E. T. 1835. Ex. 1 *M. & W.* 333.

To a declaration for work and labour as an attorney, the defendant pleaded as to all, except two sums, parcel &c., that the work was done by the plaintiff for the defendant on two occasions, when the defendant was a candidate to be returned a member of Parliament; and that, on the first, the work was done in the endeavouring to procure the defendant to be returned under an engagement not to charge for his services, but only for disbursements; and, on the other occasion, there was no express contract for the work done, but it was not reasonably worth more than a certain sum, which was one of the sums excepted in the commencement of the plea. On special demurrer—

The defendant cannot plead, that the work was done in endeavouring to secure his return to Parliament, and that he was only to charge his disbursements.

The Court held, that the plea was bad, as amounting to the general issue.

3rd.—*Evidence.*

WEBB *v.* SMITH, E. T. 1838. C. P. 4 *Bing. N. S.* 373.

IN an action on the statute, 2 Geo. 2, c. 24, s. 7, to recover the penalty for bribing a voter at an election—

As the sheriff returns the precept to the Crown-office, an examined copy is evidence.

The Court held, that an examined copy of the precept from the sheriff to the returning officer of the borough, taken from the Crown-office, was good evidence, and the original need not be produced, inasmuch as the precept ought to be returned by the sheriff to the Crown-office, which was consequently the proper place of custody.

---

5. *Indictments connected with*.*

Elegit. See tit. *Execution.*

---

* Upon an indictment under the 2 Will. 4, c. 45, (Reform Act), for giving a false answer at the poll as to having the same qualification as registered:—Held, that his having given up the key of the premises to the landlord's agent before the election, who had delivered it to another occupant, but whose rent commenced after the election, in the absence of evidence, shewing the determination of the tenancy, the indictment could not be supported. (*Rex* v. *Harris*, 1835, N. P., 7 C. & P. 253).

In order to convict a party of taking a false oath (of qualification) under 9 Anne, c. 5, the jury must be satisfied beyond all doubt, that the premises are not of the required yearly value, and that the defendant knew that they were not of that value. (*Rex* v. *De Beauvoir*, 1835, N. P., 7 C. & P. 17).

Embezzlement.

I. RELATIVE TO WHAT AMOUNTS TO, AND BY WHOM COMMITTED.

(*a*) By private individuals, p. 584.

(*b*) By officers in her majesty's service, p. 586.

II. RELATIVE TO THE INDICTMENT, p. 586.

III. RELATIVE TO THE EVIDENCE, p. 587.

IV. RELATIVE TO THE PUNISHMENT, p. 587.

I. RELATIVE TO WHAT AMOUNTS TO, AND BY WHOM COMMITTED.

(*a*) By private individuals.

By 7 & 8 Geo. 4, clerks, &c.*, receiving their master's money and not accounting,

By 7 & 8 Geo. 4, c. 29, s. 47, it is enacted, "That if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have fraudulently stolen the same from his master, although such chattel, money, or security was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned."

or agents keeping money, &c., entrusted to them for a special purpose, are guilty of embezzlement.

By 7 & 8 Geo. 4, c. 29, s. 49, it is enacted, "That if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other fine or imprisonment, or by both, as the Court

* Embezzlement by a man who is neither clerk nor servant, or in any respect under the control of the person by whom he is, in a single instance only, requested to receive money, is not punishable under 7 & 8 Geo. 4, c. 29, s. 49; he does not come within the description of clerk or servant, or a person employed for the purpose of, or in the capacity of a clerk or servant. (*Nettleton's case*, 1830, 1 Moody, C. C. 259).

shall award. And if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned."

REX *v.* THORLEY, 1832. C. C. 1 *Moo. C. C.* 342.

but receipt of money by a clerk having no authority to receive it, not an embezzlement within 7 & 8 Geo. 4, c. 29, s. 47*.

ON an indictment for embezzlement, it appeared that the prisoner was a servant of H. Brown & Sons, carriers, who had a warehouse at Birmingham. His employment was to look up goods to be carried by his masters' waggons, but he had no authority to receive money; all monies were collected and received by a collecting clerk. Mr. Price, a debtor to Brown & Sons, went into the counting-house, part of their warehouse at Birmingham, and seeing the prisoner

* So, where money was paid to the prisoner under a supposition that he was authorized to receive it, but which he never was:—Held, that it did not amount to either larceny or embezzlement. (*Rex* v. *Hawtin*, 1836, N. P., 7 C. & P. 281).

And, where a prisoner, a town-traveller, having no authority to sell goods, but merely to collect money, took an order for two articles, but entered one only in the order book, the carman delivered both, and entered the second in the invoice, the prisoner afterwards receiving the whole amount:—Held, larceny in both, not embezzlement by the one, and the being accessory by the other. (*Reg.* v. *Wilson*, 1839, C. C. C., 9 C. & P. 27).

So, where the prisoner, being a salesman as well as drover, had been intrusted to take cattle to the salesman of the prosecutor, of Smithfield, but had authority to sell them on the road if he could, and he drove them to the market and sold them there, and applied the proceeds to his own use:—Held, that, being the agent and not the servant, he was not guilty of embezzlement. (*Rex* v. *Goodbody*, 1838, C. C. C., 8 C. & P. 665).

So, where the master had had possession of the money by the hands of another clerk, from whom the prisoner received it, and afterwards embezzled part:—Held, not to be within the stat. 7 & 8 Geo. 4, c. 29, s. 47. (*Rex* v. *Murray*, 1 Moo. C. C. 276). But, held sufficient where he was entrusted only in the particular instance to receive money, and not as a general servant. (*Rex* v. *Hughes*, 1 Moo. C. C. 370).

And, where the prisoner, a servant, being sent to receive rent, immediately absconded with it:—Held, evidence of a guilty intention to appropriate, so as to constitute embezzlement. (*Rex* v. *Williams*, 1836, N. P., 7 C. & P. 338).

So, where A., a coach-proprietor, horsed the coach from H. to W., driving it himself, and liable to his co-proprietors for the receipts, employed the prisoner to drive occasionally for him, giving him all the fees, and it was his duty to account for all the sums received to his employer:—Held, that the abstracting and not accounting for part was embezzlement. (*Rex* v. *White*, 1839, N. P., 8 C. & P. 742).

A. placed valuable securities in the hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to

there standing at the desk, with some books near him, and supposing him to be a clerk authorized to receive monies, paid him 8*l.* 4*s.* 10*d.*, for which the prisoner gave a receipt, in his own name, for Brown & Sons. This sum the prisoner fraudulently applied to his own use. On a case reserved—

The Judges were of opinion that, as the servant had no authority to receive the money, the case was not within the 7 & 8 Geo. 4, c. 29.

Rex *v.* Murray, 1831. N. P. 5 *C. & P.* 145, n.

So, an overcharge is not embezzlement.

The prisoner received a sum from his employer to pay thereout the charge of an advertisement, for which he paid 1*l.*, and charged 2*l.* 0*s.* 6*d.* in his account. On a case reserved—

The Judges held, that he could not be convicted of embezzlement within 7 & 8 Geo. 4, c. 29, s. 47; and the count for a larceny, stating it to have been committed "in manner and form aforesaid," was bad.

(*b*) By officers in her majesty's service.

By 2 Will. 4, officers in her Majesty's service, who retain government money, are guilty of embezzlement*.

By 2 Will. 4, c. 4, s. 1, it is enacted, "That if any person employed in the public service of his Majesty, and intrusted, by virtue of such employment, with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever except for the public service, every such offender shall be deemed to have stolen the same, and, on conviction, shall be transported for not more than fourteen years, nor less than seven, or imprisoned, with or without hard labour, for not more than three years."

II. RELATIVE TO THE INDICTMENT.

Distinct acts of embezzlement may be charged in the same indictment.

By 7 & 8 Geo. 4, c. 29, s. 48, it is enacted, "That it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except when the offence shall relate to any chattel, it shall be sufficient to allege the embez-

his own use:—Held, that B. was not indictable under the stat. 52 Geo. 3, c. 63, (now repealed); and it seems that he would not be so under the stat. 7 & 8 Geo. 4, c. 29, s. 49. (*Rex* v. *White*, 1829, N. P., 4 C. & P. 46).

And, a servant sent by his master to get change for a note, &c., who embezzles the change, is not liable at common law for stealing the change, but must be indicted under the 39 Geo. 3, c. 85. (*Rex* v. *Sullen*, 1826, C. C., Moo. C. C. 129).

* The 7 & 8 Geo. 4, c. 29, s. 46, semble, does not apply to the case of a clerk in the public service, but the offence is against the 2 Will. 4, c. 4; and it is sufficient if the act of embezzlement takes place after he has ceased to be such clerk, if he received the money when in that capacity. (*Reg.* v. *Lovell*, 2 Moo. & R., N. P., 236).

zlement to be of money, without specifying any particular coin or valuable security; and such allegation, as far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly."

REX *v.* BEACALL, 1824. C. C. *Moo. C. C.* 15; S. C. 1 *C. & P.* 310.

The indictment must correctly describe the ownership of the chattels embezzled*.

BY 24 Geo. 3, c. xv., (local act), certain inhabitants in seven parishes are incorporated by the name of "the guardians of the poor of those parishes." Twelve directors are to be appointed out of the guardians; and the property belonging to the corporation is vested in "the directors for the time being," who are to execute the powers of the act. The prisoner was indicted for embezzling the monies of "the directors of the poor of the said parishes."

The Judges held that the monies should have been laid as the monies of "the guardians of the poor, by their corporate name," or of the directors for the time being, in their individual names.

III. RELATIVE TO THE EVIDENCE†.

IV. RELATIVE TO THE PUNISHMENT. See ante, Div. I.

* On an indictment against the clerk of a savings' bank:—Held, that he was properly described as clerk to the trustees, although he was appointed by the managers. (*Rex* v. *Johnson*, 1835, C. C., Moo. C. C. 434). So, a collector of the poor-rates, church and rector's rates, appointed in vestry under a local act, and described as servant to the committee of management:—Held sufficient, and the conviction proper under 7 & 8 Geo. 4, c. 29, s. 47. (*Reg.* v. *Callahan*, 1837, C. C. C., 8 C. & P. 154). So, where the secretary of a society received monies from a member, to be paid over to the trustees, although usually received by a steward, and he fraudulently withheld it:—Held, that it might be stated as the property of the trustees, and he be deemed their clerk and servant. (*Rex* v. *Hall*, 1836, C. C., Moo. C. C. 474). But where the party charged with embezzling was clerk to a society binding themselves by oaths of an unlawful nature, under 37 Geo. 3, c. 123, and 57 Geo. 3, c. 19:—Held, that the indictment laying the property in persons so unlawfully combined could not be supported. (*Rex* v. *Hunt*, 1838, C. C. C., 8 C. & P. 642).

† It is not sufficient to prove generally a deficiency in account, but some specific sum must be proved to have been embezzled; (*Rex* v. *Lloyd Jones*, 1838, N. P., 8 C. & P. 288); nor is it enough to prove that a clerk has received a sum of money, and not entered it in his books, unless there be also evidence that he has denied the receipt of it, or the like. (*Rex* v. *Jones*, 1837, N. P., 7 C. & P. 833). Where the indictment contained only one count:—Held, that the prosecutor could not give in evidence the receipt of several sums from different customers on the same day, but must select one sum; but that receiving money as the servant from a regular customer, from whom he had no authority to receive money, was sufficient, it being received for and on account of his master, whilst

Emblements.

GRAVES *v.* WELD, M. T. 1833. K. B. 5 *B. & Ad.* 105; S. C. 2 *N. & M.* 725.

The term, emblements, in general means annual produce.

THE plaintiff, in the spring of 1830, was possessed of a certain close or field called Cleavers, which he held, together with other closes, under a lease for ninety-nine years, determinable on three lives. In the course of the spring of 1830, the plaintiff sowed Cleavers with barley, and in May of the same year he sowed broad clover seed with the barley. The last of the three lives in the above-mentioned lease died on the 27th of July, 1830, before which time the reversionary interest in the premises demised by the lease became vested in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little clover of the plants which had sprung up, were cut off and taken together with the barley. In January, 1831, the plaintiff gave up possession of Cleavers to the defendant. According to the usual course of good husbandry broad clover is sown about April or May, and the crop is fit to be taken for hay after the beginning of June in the following year. The clover in question was cut by the defendant about the end of May, which was more than a twelvemonth after the seed had been sown.

The Court held, that the right of tenant for life or tenant pur autre vie to emblements not in a state to be gathered in at the dropping of the life, is in general confined to such emblements as are of annual produce, and therefore the plaintiff was not entitled to the crop of clover.

DAVIS *v.* EYTON, M. T. 1830. C. P. 7 *Bing.* 154; S. C. 4 *M. & P.* 820.

If a lease becomes void by the act of the tenant himself, he is not entitled to the emblements.

IN trespass, it appeared that the lessor granted lands, with a condition, that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which a writ of fi. fa. or any other writ of execution should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy as in his former estate. The lessor having entered for a breach of this condition—

Per Cur.—The rule of law is, that where the landlord enters for a condition broken he is entitled to emblements; for he holds the land as of his first estate. What are the terms of the condition in this case? That, on the happening of any one of certain events

in his employment as a servant. (*Rex* v. *Williams*, 1834, N. P., 6 C. & P. 626). Where it was the duty of the prisoner, a banker's clerk, to keep the money received in a box, and make entries of his receipts, and, upon his being called on to produce his money, he threw himself upon their mercy, and said he was 900*l.* short:—Held, upon an indictment for embezzling to a large amount, to wit, 500*l.*, that he was properly convicted, although no evidence was offered of the persons of whom the money was received, nor the sort of money abstracted; and the judgment affirmed by the Judges. (*Rex* v. *Grove*, 1835, C. C. C., 7 C. & P. 633; S. C. 1 Moo. C. C. 447).

specified, "it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate." Having entered and repossessed himself of the lands as of his former estate, we apprehend he is clearly entitled to the emblements. It is said that the condition was not broken wholly by the act of the party, because the act of another, and the act of the law concurred to induce it, but the foundation of the whole was the act of the party himself.

Encroachments*.

Equity.

BIDDELL *v.* DOWSE, H. T. 1827. K. B. 6 *B. & C.* 255; S. C. 9 *D. & R.* 413.

An order of a court of equity, directing a submission, cannot be made the subject of an action.

ALL matters in difference between parties to a suit in equity, some of whom were infants represented by their next friends, were referred to arbitration by an order of the Vice-Chancellor, "with the consent of the attornies of the parties in the said suit;" and an action being brought upon the award—

Per Cur.—The submission in the declaration is an order of the Vice-Chancellor, made in a suit pending before him, by consent of the attornies of the parties in the suit. The order of the Vice-Chancellor cannot be enforced by action.

Erasure.

TOMLINS *v.* LAWRENCE, T. T. 1829. C. P. 6 *Bing.* 376; S. C. 3 *M. & P.* 555.

If proceedings are to be stayed on a document being delivered up, the fact of its having many erasures is a ground for making the rule absolute without costs.

IN an action by an indorsee against the acceptor of a bill of exchange, a rule was obtained to stay the proceedings on payment of debt and costs, and that the bill should be delivered up to the defendant. On shewing cause the plaintiff produced the bill, on which the names of the drawer and indorsers were found to have been obliterated with ink, and rendered illegible.

The Court said, that all that they could do was to make the rule absolute; and that if there were any spoliation done on the bill, the defendant might bring his action; but that, under the circumstances of the case, they would make the rule absolute without costs.

* If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. (*Doe* v. *Rees*, 1834, N. P., 6 C. & P. 610).

Error, Writ of.

See tit. *Cognovit.*

I. IN CIVIL PROCEEDINGS.

(*a*) Relative to the proceedings on which a writ of error will lie, p. 591.

(*b*) Relative to the grounds of error, p. 592.

(*c*) Relative to frivolous writs of error, p. 593.

(*d*) Relative to the court from and to which it lies, p. 593.

(*e*) Relative to the parties to the writ, p. 594.

(*f*) Relative to the form of the writ, p. 595.

(*g*) Relative to the suing out, p. 596.

(*h*) Relative to the effect of, and allowance of, p. 596.

(*i*) Relative to bail in, p. 598.

(*j*) Relative to certifying or transcribing the record, p. 600.

(*k*) Relative to alleging diminution of, and of the assignment of error, p. 601.

(*l*) Relative to the sci. fa. quare executionem non, p. 602.

(*m*) Relative to the pleadings and joinder in error, p. 602.

(*n*) Relative to affidavits connected with, p. 603.

(*o*) Relative to amendments connected with, p. 603.

(*p*) Relative to the error books, p. 605.

(*q*) Relative to the argument on, p. 605.

(*r*) Relative to the sum recoverable, p. 606.

(*s*) Relative to the judgment, p. 607.

(*t*) Relative to the costs, p. 608.

(*u*) Relative to the execution, p. 610.

(*v*) Relative to the restitution, p. 611.

(*w*) Relative to setting aside and quashing, p. 611.

(*x*) Relative to a repleader, p. 612.

II. IN CRIMINAL PROCEEDINGS, p. 612.

I. IN CIVIL PROCEEDINGS.

(*a*) Relative to the proceedings on which a writ of error will lie.

Snook *v.* Martocks, E. T. 1836. K. B. 5 *Ad. & E.* 239.

Error does not lie on a feigned issue,

On a feigned issue, to try the existence of a custom in a manor, the jury had found for the plaintiff, subject to the opinion of the Court, which also gave judgment in his favour, whereupon the defendant brought error in the Exchequer Chamber, on the ground that the customs stated in the declaration were not legal; but—

The Court quashed the writ, on the ground that error did not lie on a feigned issue.

Evans *v.* Swete, M. T. 1824. C. P. 2 *Bing.* 326.

nor on a judgment of nonsuit, unless specific objection pointed out;

Judgment of nonsuit was signed in this case on the 9th of July, but a writ of error had previously been lodged with and allowed by the clerk of the errors, and a copy of the allowance was, immediately after signing judgment, served on the defendant's attorney, before he quitted the prothonotary's office; notwithstanding which, and without any rule for leave to take out execution, a writ of testatum fieri facias was on the next day sued out against the plaintiff, and delivered to the sheriff of Middlesex, who took possession of the plaintiff's goods by virtue of the same.

Per Cur.—It is clear that, in cases where execution is allowed to issue notwithstanding a writ of error, there must be satisfactory evidence that the writ of error is brought for delay; but inasmuch as a writ of error, brought on a nonsuit, leaves no colour for denying the imputation of delay, the Courts have required that, on a rule for setting aside execution, there *shall* be an affidavit of some specific error; and the general assertion of the plaintiff's attorney to that effect is not sufficient.

See 1 *H. Bl.* 432; 4 *T. R.* 436; 5 *Id.* 668.

Apothecaries' Company *v.* Harrison, E. T. 1841. Q. B. 4 *P. & D.* 292.

and in an action for penalties, after verdict by consent for one only, a writ of error will not lie.

In an action of debt for penalties by the Apothecaries' Company, it was agreed at the time that a verdict should be taken for one penalty only.

The Court held, that the defendant could not bring a writ of error.

Brown *v.* Lord Granville, E. T. 1834. C. P. 2 *D. P. C.* 796; S. C. 4 *M. & Scott*, 333.

So, no writ of error lies after an agreement to abide by a decision on demurrer.

By an agreement between the attornies of the parties, in an action for rates, to raise the question of the defendant's liability on demurrer, it was arranged that each party should pay his own costs, and that such decision should bind the parties—

The Court held, that the parties thereby precluded themselves from bringing a writ of error.

(*b*) Relative to the grounds of error.

Beven *v.* Cheshire, M. T. 1834. B. C. 3 *D. P. C.* 70.

An infant appearing by attorney instead of by guardian is a ground of error*;

Writ of error. The plaintiff, an infant, by attorney assigned for error coram nobis, that he had improperly appeared by attorney, instead of by guardian.

The Court held this not a mere irregularity, but ground of error, and not waived by laches, in not coming in the first instance; and the Court set aside the assignment, and allowed the plaintiff in error to assign by guardian.

Ruston *v.* Owston, H. T. 1825. C. P. 2 *Bing.* 469.

but formerly, declarations being intitled of term generally, cause of action, stated on a day subsequent to the first day of the term, was no ground of error†.

The cause of error was, that the declaration was intitled generally of Michaelmas Term, 4 Geo. 4, and therefore related to the first day thereof, November 6th, while all the causes of action were stated to have accrued on the 18th of November.

Per Cur.—This declaration is intitled of Michaelmas Term, which commences on the 6th of November; but we may collect that it was delivered after the 6th, for the causes of action are stated to have accrued on the 18th, and we can take judicial notice that that is a day within the term. The whole is considered as one day; and it is sufficient, if there is any thing on the record to shew the declaration to have been within the term.

Whitehead *v.* Greetham, H. T. 1825. C. P. 2 *Bing.* 464.

After verdict, insufficient statement of consideration for promise no ground of error.

Declaration in assumpsit. The third count stated that plaintiff had retained defendant, at his request, to lay out 700*l.* in the purchase of an annuity; that defendant promised to lay it out securely; that plaintiff delivered to him the money for that purpose; and that defendant laid it out insecurely. After verdict, on error, the ground of error was, that a general verdict had been given by the jury for the plaintiff below upon the first five counts of the declaration, with general damages, though the third count was substantially defective, in not alleging a sufficient consideration for the promise and undertaking set forth in that count.

Best, C. J., said, the Court is of opinion that the count is sufficient after verdict. The objection could not be raised in this stage of the cause; if available at all, it is an objection on demurrer, but not in error.

Powell *v.* Sonnett, H. T. 1826. C. P. 3 *Bing.* 381; S. C. 1 *D. P. C.* 56; 1 *Bli. N. S.* 545.

And it is no ground of error that the record states with respect to immaterial issues,

The declaration contained twenty counts, twelve of which were special. The defendants below pleaded the general issue to all the twenty counts and the Statute of Limitations, and a set-off to the last eight counts. The jury found for the plaintiffs below, damages £24,000, on the twelve special counts; for the defendants below

* But it is no ground of error coram nobis, that the writs of venire facias and distringas juratores are returned with only one panel annexed to both. (*Green* v. *Smith*, T. T. 1836, Ex., 5 D. P. C. 174).

† See Rule H. T. 4 Will. 4, ante, *Declaration.*

upon the remaining eight; for the plaintiffs below on the issue as to the Statute of Limitations; and on the issue on the set-off the jury were discharged. The defendants below brought error into this Court, assigning as a ground, that it was not stated in the record that the jury had been discharged on the issue arising out of the plea of set-off to the last eight counts, with the consent of the parties.

the jury were discharged as to them, without showing consent of the parties.

The Court refused to reverse, on error, the judgment for plaintiff, on the grouud, that the discharge of the jury was not stated on the record to be with the consent of the parties.

(*c*) Relative to frivolous writs of error. See post, Div. (*h*) *Relative to the effect of, and allowance of,* 596, *n.*

(*d*) Relative to the court from and to which it lies*.

Gibbs *v.* Trevanion, M. T. 1839. B. C. 8 *D. P. C.* 140.

On motion for the allowance of a writ of error coram nobis, at the instance of the defendant, without putting in bail. The difficulty was, whether there was any occasion to apply to the Court for leave to issue the writ of error, or whether the officer might not issue it as a matter of course?

Error coram nobis matter of right when bail is put in.

Littledale, J.—If bail was put in, it would be issued as a matter of course; but, as the writ is required without putting in bail, a rule nisi only can be granted.

Bourne *v.* Rex, E. T. 1837. K. B. 2 *N. & P.* 248.

An indictment, upon which an erroneous judgment had been given by the sessions, had been removed by writ of error—

A writ of error does not lie from the sessions to the K. B.;

The Court held, that the Court of King's Bench had no authority to pronounce a right judgment, or to remit the record to the sessions.

Nesbit *v.* Rishton, M. T. 1828. Q. B. 9 *Ad. & E.* 426.

On a writ of error from the county palatine of Lancaster to the Court of Queen's Bench—

but it lies from County Palatine of Lancaster.

The Court held, the 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, to include "any judgment given by any of the three superior courts at Westminster," and applies to judgments on writs of error, and therefore that error lies on a judgment on a writ of error in Queen's Bench from the county palatine of Lancaster.

* A writ for error in fact lies coram nobis in K. B., (*Lampton* v. *Collingwood*, M. T. 1694, K. B., 3 Salk. 145; *Cooper* v. *Ginger*, M. T. 1724, K. B., 1 Stra. 607), but not for error in point of law; for error in fact is not the error of the Judges, and, therefore reversing it, is not reversing their own judgment. (See 1 Rol. Abr. 747; Cro. Eliz. 105). Hence, if the error be in the process, or through the default of the clerks, it may be reversed in the same Court. (See F. N. B. 21). But, if an erroneous judgment be given in K. B., and the error be in the judgment itself and not in the process, a writ of error does not lie in that Court. (See 1 Rol. Abr. 746). In the Common Pleas, the record and process being stated to remain before the King's justices, the writ is called a writ of error coram vobis, or quæ coram vobis resident. (See Tidd, 1191, 8th edit.).

FINCH *v.* BROOK, M. T. 1835. C. P. 2 *Bing. N. S.* 324; S. C. 2 *Scott*, 511.

After nil debet in a county court, and tender as to part pleaded, that Court gave judgment for the defendant, the Court of Appeal reversed the judgment, directing the debt admitted and costs to be paid to plaintiff.

THE judgment for the defendant in this case having been reversed on a writ of false judgment as reported in 1 Bing. N. C. 253, the plaintiff applied to the court below to have the judgment entered for him and his costs allowed. The officer of that Court doubting its jurisdiction, and expressing an opinion that the judgment should be entered for the plaintiff, and his costs taxed by the superior Court—

Tindal, C. J.—Upon general principle, as well as upon the authority of *Geldart* v. *Gladstone*, (12 East, 688), the Court are bound to give such judgment upon this writ of false judgment, as justice between the parties shall seem to require. The only objection on the other side is, that the record is in such a state as prevents and renders it impossible for us to give the judgment which is sought. The state of the pleadings is this: the defendant says, nil debet, except as to 1*l.* 12*s.* 5*d.*, parcel of the demand; and, as to that sum, that, after the time when the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., became due and payable, and before the exhibiting of the bill of the plaintiff in that behalf, to wit, on &c., at &c., and within the jurisdiction aforesaid, the defendant was ready and willing, and then and there tendered and offered to the plaintiff to pay the plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., and to receive which of the defendant the plaintiff then and there wholly refused. The jury found that the defendant did not owe more than 1*l.* 12*s.* 5*d.*; and with regard to this sum the jury submitted to the court below in their special verdict whether the facts amount to a tender. In the opinion of this Court the facts did not amount to a tender, and consequently the verdict should be for the plaintiff.

(*e*) RELATIVE TO THE PARTIES TO THE WRIT*.

* All the parties to the judgment must join. (*Cowper* v. *Ginger*, M. T. 1737, 11 Geo. 1, K. B., 8 Mod. 317; S. P. *Miles* v. *Ginger*, 8 Mod. 316; S. P. *Ratcliff* v. *Burton*, E. T. 1734, Hard. 135; S. P. *Turner* v. *Bower*, 11 Mod. 321). It is a general rule, that no person can bring a writ of error who was not a party to the record; (see Bac. Abr. 195); hence, if there be a judgment against the principal, and also against the bail, the principal cannot have error on the judgment against the bail; (see Bac. Abr. 199); nor the bail on the judgment against the principal; (see 2 Leon. 101; Cro. Car. 408); nor can they join in a writ of error; for these are distinct judgments and affect different persons.

If an action be brought against a feme covert, as feme sole, and she plead to issue as a feme sole, and judgment be given against her, upon which she is taken in execution, she and her husband must join in bringing a writ of error; for otherwise the husband might be prejudiced by losing the society of his wife and her care in his domestic concerns, and he hath no other means to help himself. (See 1 Rol. Abr. 748). So, if an action be brought against a feme covert and others, they may all join with the husband in bringing a writ of error, (see 1 Rol. Abr. 478), provided they are all living and aggrieved by the judgment; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time; (see Carth. 8); but where the judgment is against several, and one or more die, the writ may be sustained by the survivors. (See Barnes, 202).

(*f*) Relative to the form of the writ*.

Ricketts *v.* Lewis, M. T. 1831. Ex. 2 *C. & J.* 11; S. C. 2 *Tyrw.* 16.

An action was originally commenced in the Court of Common Pleas, and was removed into the Court of King's Bench by writ of error. A writ of error was afterwards brought under the 1 Will. 4, c. 70, s. 8, in the Exchequer.

Tindal, C. J., said, that it was not a case within the letter or contemplation of that statute, which applied only to cases originally commenced in the Court to which the writ of error was directed.

The 1 Will. 4, c. 70†, only applies to cases originally commenced in the Court to which the writ of error is directed.

Gurney *v.* Gordon, M. T. 1831. Ex. 2 *C. & J.* 11; S. C. 2 *Tyrw.* 15.

On a writ of error—

Tindal, C. J., observed, that the writ of error was founded upon the statute of Elizabeth, 2 Eliz. c. 8, and was returned under the late statute, 1 Will. 4, c. 70, s. 8, and was, therefore, coram non judice.

A writ of error founded on the 27 Eliz., and returned under 1 Will. 4, is coram non judice, and of no avail.

Laidler *v.* Foster, E. T. 1825. K. B. 4 *B. & C.* 116.

On motion to quash a writ of error, because there were only twelve days between the teste and return—

Per Cur.—It is not necessary that fifteen days should intervene between the teste and return. Such a writ is not the commencement of a suit, and is tested on the day when it issues. (*Hill* v. *Tebb*, 1 N. R. 278).

See Tidd, Pr. 1171, *contra.*

There need not be fifteen days between teste and return.

Archbold *v.* Smith, M. T. 1836. Ex. 1 *M. & W.* 740; S. C. 1 *T. & G.* 949.

On error—

The Court held, that the sheriff having returned the venire facias

It is sufficient for the sheriff

* The writ must be directed to the Chief Justice by his natural name, and not that of his office. (*Nutton* v. *Crow*, H. T. 1714, K. B., 10 Mod. 283). But this rule does not apply to the Judge of an inferior court. (*Evans* v. *Roberts*, M. T. 1703, K. B., 6 Mod. 61). The writ should correspond with the record in the description of the parties, (*Cook* v. *Hamilton*, H. T. 1716, K. B., 10 Mod. 368), and nature of the action; therefore, if the writ be of a plea of trespass, and the record in covenant, it will be bad. (*Sampayo* v. *De Payba*, T. T. 1813, C. P., 5 Taunt. 82).

The writ of error being made out, is sealed, either on the general seal day, or which is somewhat more expensive, at a private seal. (See Tidd, 1192, 8th edit.).

† Enacts, "That writs of error upon any judgment, given by any of the said Courts, shall hereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the other two courts in the Exchequer Chamber, any law or statute to the contrary notwithstanding; that a transcript of the record only shall be annexed to the return of the writ, and the Court of error, after errors are duly assigned and issue in error joined, shall, at such time as the Judges shall appoint, either in term or vacation, review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains, from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament."

to annex one panel on returning the venire and distringas.

and distringas, it was not necessary that he should have annexed two distinct panels, but that he might annex the same panel to both writs.

BERDO *v.* BLOMFIELD, T. T. 1825. K. B. 6 *D. & R.* 509.

The grounds of error must be stated after a threat to bring error to create delay.

ON error—

The Court held, that a writ of error does not stay execution, unless the defendant suggest that there is real ground of error, where it appears that, after action brought, the defendant threatened to bring a writ of error, and ruin the plaintiff with law proceedings, unless he complied with certain terms.

Vide infra.

(*g*) RELATIVE TO THE SUING OUT*.

(*h*) RELATIVE TO THE EFFECT OF, AND ALLOWANCE OF†.

LEVI *v.* PRICE, T. T. 1837. Ex. 5 *D. P. C.* 775; S. C. 2 *M. & W.* 533.

A writ of error coram vobis is a supersedeas‡

A WRIT of error coram vobis was sued out on the 17th of February, and notice thereof given to the plaintiff's attorney on the 22nd. On the 19th of April the plaintiff levied on the defendant's

* To obtain a writ of error, application must be made by the attorney to the cursitor of the county where the venue was laid in the original action, who will make out the writ in ordinary cases as matter of course, upon a præcipe, or note of instructions, containing the names of the parties, the nature of the judgment, the court wherein it was given, and the time when the writ is intended to be returnable. In Parliament, there must be a writ of error from the Crown, which is procured by the cursitor; (see Imp. K. B. 705); and when it is against the King, the fiat of the Attorney-General must be obtained, upon a petition setting forth the errors to be assigned, accompanied with a certificate from counsel that they are real errors. (See Sav. 131; 1 Salk. 264).

† By 6 Geo. 4, c. 96, for preventing the delays occasioned to creditors by frivolous writs of error, brought on judgments given in his Majesty's courts of record at Westminster, and in the counties palatine, and in the courts of great session in Wales, it is enacted, "That, upon any judgment hereafter to be given in any of the said courts in any personal action, execution shall not be stayed or delayed by writ of error or supersedeas thereupon without the special order of the court, or some judge thereof, unless a recognizance, with condition, according to 3 Jac. 1, c. 8, be first acknowledged in the same court."

‡ By Rule, H. T. 2 Will. 4, a writ of error shall be deemed a supersedeas from the time of the allowance.

And by Rule, H. T. 4 Will. 4, "No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued; provided, that, if the error stated in such notice shall appear to be frivolous, the court, or a judge, upon summons, may order execution to issue."

Where the notice of allowance of error stated the ground of error to be, that the words in an action of slander were not actionable in themselves:—Held sufficient. (*Robinson* v. *Day*, E. T. 1834, B. C., 2 D. P. C. 501).

Strong circumstances must be shewn to induce the Court to interfere in controlling the legal effect of a writ of error. (*Bleasdale* v. *Darby*, 9 Price, 606; see *Redford* v. *Garrod*, 7 Taunt. 537).

Where the notice of allowance was in trespass, the action being in replevin:—Held, that the variance was material, and that the plaintiff might sue out execution. (*Hills* v. *Spilsbury*, E. T. 1833, B. C., 1 D. P. C. 421). So, where the notice was in case and the action in trespass. (*Green* v. *Okill*, Id. 422).

goods under a fieri facias; and on the same day, after the levy, the writ of error was allowed. It was contended that, since the Rules 1 Reg. Gen., H. T. 2 Will. 4, s. 83, and 9 Reg. Gen., H. T. 4 Will. 4, (ante, 596, n.), a writ of error was a supersedeas from the time of its allowance only, and not, as formerly, from the time of notice; but—

The Court held, that it was a supersedeas from the time of the notice.

from the time of being sued out, and notice thereof.

SEMPLE *v.* TURNER, H. T. 1840. Ex. 6 *M. & W.* 152; S. C. 8 *D. P. C.* 246.

THE defendant having sued out a writ of error coram nobis, and given the plaintiff notice thereof, the plaintiff obtained a Judge's order for leave to issue execution, and thereupon took the defendant under a ca. sa., before he could apply to the Court for a stay of proceedings.

Per Cur.—A writ of error of this nature is not of itself a supersedeas, but it is necessary to apply to the Court for leave to issue execution; for it seemed an unreasonable thing that the plaintiff should of himself have the power to issue execution after a writ was sued out, which might altogether destroy his right of action. That reason is given by Lord *Ellenborough* in *Birch* v. *Trist*, (8 East, 412).

But, error coram nobis is not of itself a supersedeas, but leave must be obtained to issue execution.

KEELING *v.* AUSTIN, T. T. 1820. C. P. 7 *Bing.* 601.

ON a writ of error—

The Court decided, that, notwithstanding the 1 Will. 4, c. 70, the Court will not stay execution after a writ of error on a judgment of nonsuit, the act only establishing a new tribunal, and leaving the practice as before.

The practice is not altered by 1 Will. 4, c. 70.

BELSHAW *v.* MARSHALL, E. T. 1832. K. B. 4 *B. & Ad.* 336.

ON error, it appeared that notice of allowance had been given to the sheriff, notwithstanding he had proceeded with a writ of execution—

The Court held the notice sufficient to render the sheriff liable on process without any supersedeas being issued; and that notice to him is also notice to his officers.

Notice of allowance of a writ of error to sheriff suffices to render him liable in trespass.

MARSTON *v.* HALLS, M. T. 1836. Ex. 5 *D. P. C.* 292; S. C. 2 *M. & W.* 60.—S. P. MAITLAND *v.* MAZAREDO, 6 *M. & S.* 139.

ON motion to bring up the defendant for the purpose of charging him in execution, an affidavit stated, that a writ of error had been sued out, and a copy of the note of allowance thereof duly served on the plaintiff's attorney.

Per Parke, B.—The motion should be to discharge the writ of error. As soon as a writ of error is sued out, it paralyzes any proceedings on the judgment. If the writ is irregularly or improperly sued out you ought to move to set it aside.

A defendant cannot be charged in execution after notice of allowance.

JONES *v.* DE LISLE, T. T. 1835. C. P. 3 *Bing.* 125.

The Court has no power to set aside the allowance of a writ of error.

ON motion to set aside the allowance of a writ of error, on the ground that the writ had been sued out for the purpose of delay—

Per Cur.—We cannot interfere. If the writ has been improperly sued out, you may move against the attorney. Apply to Chancery, whence the writ issues, or move to proceed with execution notwithstanding.

PITT *v.* WILLIAMS, T. T. 1835. B. C. 4 *D. P. C.* 70.

And after transcript removed, the Court below has no jurisdiction.

ON a writ of error, it appeared that the transcript had been removed—

The Court of error held, that the Court below had no jurisdiction to allow judgment of non pros. to be signed on account of its not having been prepared in due time, although no laches existed, on the part of the defendant in error, in endeavouring to sign such judgment.

NOWELL *v.* ROAKE, M. T. 1827. K. B. 7 *B. & C.* 404; S. C. 1 *M. & Ry.* 170.

A former recovery may be pleaded, notwithstanding a writ of error was pending.

IN trespass for an expulsion, and for mesne profits, to which defendant pleaded former recovery in C. P. for the very same trespass, and judgment against plaintiff: replication, that such judgment was reversed in error in K. B.: rejoinder, that the writ of error was returnable before judgment given in C. P., traversing, that, after judgment given, the record was brought into K. B. by virtue of writ of error.

The Court held, that, upon the issue taken upon such traverse, it was sufficient that it was shewn by the return made by the Chief Justice of C. P., that the transcript was brought in after the taxation of costs, and the pendency of a writ of error in the Lords did not vary the case.

(*i*) RELATIVE TO BAIL IN*.

WADSWORTH *v.* GIBSON, E. T. 1828. C. P. 4 *Bing.* 572.

Whether the error be matter of form or substance, there must be bail under 6 Geo. 4, c. 96.

A WRIT of error having been allowed in this cause, application was made, that the bail required by the statute 6 Geo. 4, c. 96, s. 1, might be dispensed with. The affidavit on which the application was founded stated that a writ of capias ad respondendum was sued out of this Court into the county palatine of Lancaster, to which the defendant appeared; that the plaintiff declared in a plea of trespass on the case, laying the venue in Lancashire, to which the defendant did not plead, but allowed judgment to go by default; that a writ of

* By Rule, H. T. 2 Will. 4, if bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within five days from the time of such notice, otherwise on the first day of the ensuing term.

To entitle to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

Further time to put in bail in error not granted but on the terms of shewing error on the record, and depositing the amount of the judgment with the Master. (*Anon.*, H. T. 1831, B. C., 1 D. P. C. 32).

inquiry was executed in the county palatine of Lancaster, and final judgment afterwards signed thereon; that a writ of error had issued, and had been duly allowed and served; that such writ was not for delay; but that it was the intention of the defendant to assign for error the want of an original writ, which is good and substantial error.

Per Cur.—The defendant must put in bail. The error to be assigned is one of mere form, and is not entitled to any indulgence.

LEVI *v.* PRICE, T. T. 1837. Ex. 5 *D. P. C.* 775.

ON error—

Per Parke, B.—The 6 Geo. 4, is in pari materiâ with the statute of James, and *Birch* v. *Triste*, (8 East, 412), decided, that the latter act did not apply to error in fact.

But the 6 Geo. 4 does not apply to error in fact;

GILLINGHAM *v.* MYERS, H. T. 1825. Ex. 1 *M'Clell. & Y.* 147.

JUDGMENT was completed in this cause on the 23rd November, 1824, on which the plaintiff brought a writ of error, to prevent the issuing of execution thereon. Bail in error was not put in. On motion to issue execution, it was contended that the case fell within the 3 Jac. 1; but—

The Court said, the simple question is, Is this a bond for the payment of money only? In common understanding, it is quite different; it is a bond to replace stock; there is no specific sum of money, no liquidated demand to be paid. A bond to replace stock is in the nature of a bond for performance of covenants, and that is clearly not within the statute.

and a bond to replace stock not such a security as requires bail under 3 Jac. 1.

HENLEY *v.* MAYOR OF LYME REGIS, E.T. 1829. C.P. 6 *Bing.* 195.

IN an action against the corporation of Lyme Regis, the plaintiff opposed one of the bail in error, on the ground of his being a member of the corporation, (a burgess), and therefore one of the defendants.

The Court overruled the objection.

In an action against the corporation, a corporator was admitted as bail in error.

SUTCLIFFE *v.* ELDRED, T. T. 1833. B. C. 2 *D. P. C.* 184.

MOTION to set aside an execution, on the ground that it had issued after bail in error put in. In answer to the application, it was sworn that the bail put in was sham bail.

Per Taunton, J.—It appears, from the affidavit on the part of the defendant in error, that these bail, or at least one of them, were sham bail. On the authority of the cases of *Ward* v. *Levi*, (1 B. & C. 268; S. C. 2 D. & R. 421), and *Crum* v. *Kitchen*, (2 D. & R. 421; S. C. 1 B. & C. 269), I think that the defendant, in error, was justified in treating the bail as a nullity, and issuing execution.

If sham bail be put in, execution may issue;

BROWNE *v.* BROWN, M. T. 1826. C. P. 4 *Bing.* 38.—S. P. FULLER *v.* COMBE, H. T. 1830. C. P. 4 *M. & P.* 792.

IN error, it appeared that the bail were hired.

The Court said it was a fraud upon the Court, though it was in-

it is a fraud upon the Court.

tended to have added good bail afterwards; and a rule to set aside an execution issued was discharged, with costs.

ROGERS *v.* BALL, T. T. 1833. B. C. 2 *D. P. C.* 197.

Bail leaving town is no ground for time, unless defendant was taken by surprise.

ON motion for time to justify bail in error, on the ground of the bail having been forced suddenly to leave town on particular business—

Per Taunton, J.—I cannot grant time. You have no statement in your affidavit that the fact of the bail leaving town was a surprise upon you. For anything that appears, this may be a mere contrivance between the bail and the defendant.

ADNAM *v.* WILKS, H. T. 1827. K. B. 6 *B. & C.* 237.

Excepting to bail does not make them as no bail.

A RULE to shew cause why the names of the bail in error should not be struck out of the recognizance, or why an exoneretur should not be entered on the bail-piece. Upon an affidavit that bail in error was put in on the 16th June, 1826; that on the same day the plaintiff's attorney took out and served a rule for better bail—

The Court thought the bail were not entitled to be relieved; their entering into the recognizance had prejudiced the plaintiff; the writ of error was still pending; and it might yet happen that the plaintiff would be put to costs in carrying out the proceedings. The recognizance of the bail was to answer those costs, as well as the judgment in the action; and whether they justified or not, they were liable. Their justification, if called for, was only their proving, to the satisfaction of the Court, that they had sufficient property.—Rule discharged.

RICHARDSON *v.* MELLISH, M. T. 1824. C. P. 9 *Moore*, 579.

Names of bail need not be stated in notice of justification, but may be referred to as already put in.

THE justification of the bail was opposed, on the ground of the insufficiency of the notice, which was as follows:—"Take notice, that the bail already put in for the defendant will come up to justify on the 1st day of the next Michaelmas Term." But the officers of the Court stated, that it was decided, in *England* v. *Kerwan*, (1 Bos. & Pul. 335), that where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification, and that such rule had since been invariably adhered to. The Court permitted the bail to justify.

(*j*) RELATIVE TO CERTIFYING OR TRANSCRIBING THE RECORD*.

SMITH *v.* BAIL, T. T. 1829. C. P. 3 *M. & P.* 242.

The plaintiffs and defendants'

THE justification of bail in error in this cause was opposed on the ground of the notice of bail containing the names of the plaintiff

* By Rule, H. T. 4 Will. 4, it is ordered, "That no rule to certify or transcribe the record shall be necessary, but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the Court in which the judgment is given, and pay the transcript-money to him, in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The clerk of the errors shall, after payment of the transcript-money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the Court of error."

and defendant in the original action. The clerk of the errors stated the practice to be thus:—After a writ of error brought and allowed, the names of the parties in the original action are continued in the notices of bail and exceptions, and in the rule to certify, until the transcript of the record is carried over and filed, when the names are reversed.

names stand as in the original action, until the transcript of the record is carried over and filed.

(*k*) Relative to alleging diminution, and of the assignment of error.

Reg. Gen., H. T. 1833, K. B., C. P., and Ex.

By Rule, it is ordered, "That no rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary in order to compel an assignment of errors, but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the Court of error, or to the signer of the writs in the King's Bench in cases of error to that Court, or within twenty days after the allowance of the writ of error in cases of error coram nobis or coram vobis, the plaintiff in error shall assign errors, and, on failure to assign errors, the defendant in error, his executors, or administrators, shall be entitled to sign judgment of non pros."

A rule to allege diminution, &c., is no longer necessary.

Rex *v.* Carlisle, Ex. 1831. K. B. 2 *B. & Ad.* 362.

The plaintiff, in error, who had been convicted of libel at the Sessions of Oyer and Terminer of the city of London, holden by patent under the great seal, directed to the Lord Mayor, certain Judges, Aldermen, Recorder, and others, "or any two or more of them," assigned errors in law, viz. that the judgment was insufficient and should have been for the defendant; and of fact, viz. that only one of the justices named in the commission was present in Court when the jury gave their verdict, and that the verdict at the time when it was so given was not entered of record.

There cannot be an assignment of errors in fact and law.

The Court held, that an assignment of errors in fact and law was irregular, and demurrable for duplicity, and should not have been allowed if it had not been waived by the prosecutor; that it being impossible the verdict should be recorded at the time of being given by an act subsequent to the delivery, it was no error in fact; and lastly, that, as in the case of a misdemeanor, a privy verdict might be given.

Castledine *v.* Munday, T. T. 1833. K. B. 4 *B. & Ad.* 90.

This came before the Court upon a writ of error from the Court of Common Pleas. The declaration contained a count for a forcible entry upon the stat. 8 Hen. 6, c. 9, (which gives treble damages and treble costs), and counts upon trespass at common law for breaking and entering the plaintiff's house. The record upon the face of it shewed that the defendant appeared in person and suffered judgment by default. A writ of inquiry was thereupon executed before the sheriff, and the jury assessed the damages generally at 100*l.*, and the judgment thereupon entered up was, "that the plaintiff do recover against the defendants the sum of 200*l.*,

On a bad assignment of error in fact the Court will give judgment on an error in law, although no error in law be assigned.

being treble the amount of the damages found by the inquisition, and the sum of 193*l.* 18*s.*, being treble costs." The record being moved upon the writ of error into this court, the defendants (plaintiffs in error) assigned for error, that Matthew Castledine appeared in the suit in his own proper person, although at the time of his said appearance and also at the time of giving judgment he was under the age of twenty-one years, to wit, of the age of seventeen years and no more, in which case the said Matthew ought to have been admitted to appear in the Court below to defend the suit aforesaid by his guardian and not in his own proper person. [The pleading then, without adding any verifications, proceeded].

The Court held an assignment of error in fact will be badly pleaded if it conclude not with a verification; yet though the assignment of error be badly pleaded, if the Court see that the judgment of the Court below is bad in point of law, they will reverse it, notwithstanding no error in law is assigned.

(*l*) RELATIVE TO THE SCIRE FACIAS QUARE EXECUTIONEM NON. See next Div. (*m*), *infra*.

(*m*) RELATIVE TO THE PLEADINGS* AND JOINDER IN ERROR.

REG. GEN., II. T. 1833, K. B., C. P., & Ex.

Joinder in error must be within twenty days.

BY Rule, it is ordered, "That no scire facias ad audiendum errores shall be necessary (unless in case of a change of parties); but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed."

REG. GEN., II. T. 1833, K. B., C. P., and Ex.

And if the time has not expired before 10th August, then the same after the 24th October.

BY Rule, it is provided, "That if, in any case, the time allowed as hereinbefore mentioned for getting the transcript prepared and examined for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th day of August, in any year, the party entitled to such time shall have the like time for the same purpose, after the 20th day of October, without reckoning any of the days before the 12th of August."

GRANT *v.* SMITH, E. T. 1836. Ex. 5 *D. P. C.* 107.—S. P. ARCHBOLD *v.* SMITH, T. T. 1836. Ex. 1 *M. & W.* 740; S. C. 1 *T. & G.* 949.

Counsel's signature is not

THE cause was in error coram vobis, and the defendant had delivered the common joinder in error, without the signature of coun-

* To the assignment of errors the defendant may plead or demur. Pleas in error are common or special. The common plea, or joinder, as it is more frequently called, is in nullo est erratum, or that there is no error in the record or proceedings, which is in the nature of a demurrer, and at once refers the matter of law arising thereon to the judgment of the Court.

Special pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors or the Statute of Limitations, to which plaintiff may reply or demur, and proceed to trial. (See 6 T. R. 544).

sel, upon which the plaintiff signed judgment. On motion to set it aside—

The Court sent to inquire of the Masters of the K. B., and the Prothonotaries of the C. P.; and they having reported that the common joinder need not be signed by counsel, the Court made the rule absolute to set aside the judgment.

required to the common joinder in error.*

(*n*) Relative to affidavits connected with.

Gandell *v.* Rogier, M. T. 1825. K. B. 4 *B. & C.* 862; S. C. 6 *D. & R.* 259.

Gandell obtained judgment against Rogier in the Common Pleas. Defendant brought a writ of error, and Gandell sued out two writs of sci. fa. quare executionem non. On an objection to the affidavit on which the rule was obtained, viz. that it was intitled in the original action—

Bayley, J.—The writs were sued out of this Court by Gandell as defendant in error, the objection to the affidavit is therefore valid.

Affidavits used in a Court of error must be intitled in that Court, and not in the Court below.

(*o*) Relative to amendments connected with.

Mellish *v.* Richardson, H. T. 1828. K. B. 7 *B. & C.* 819.

In assumpsit, a general verdict was given for the plaintiff, on a declaration consisting of several counts, some of which were bad in point of law. The evidence applied to all the counts. The Court of Common Pleas, after writ of error brought, and after argument in the Court of error, amended the postea, by entering the verdict for the plaintiff on the first count, and for the defendant on the others, and amended the judgment-roll remaining in that Court by the amended postea. After judgment had been reversed by the King's Bench, on the question whether the Court of King's Bench, as a Court of error, is bound to amend the record by that of the Common Pleas, though the latter has been amended after the judgment, and reversed by the Court of King's Bench—

Bayley, J., said, (there being a difference of opinion among the Judges), we think it right to state the facts upon the record, so that a Court of error may have an opportunity of considering whether the amendment which we have required to be made ought to be made or not. We have drawn out the entry, and will deliver it to the clerk of the rules, and he will deliver a copy to each of the parties. I forbear giving any opinion upon the case, thinking it better that it should go without prejudice to the Court of error, where the question may be considered, whether the amendment was properly made or not.

It seems that the Court of K. B., as a Court of error, may amend the record by that of the Court below.

* If the Crown will not join in error, the party is entitled to be discharged, applies in cases of felony as well as misdemeanor. (*R.* v. *Howes*, M. T. 1837, K. B., 7 Ad. & E. 60, n.).

SALTER *v.* SLADE, T. T. 1834, K. B. 3 *N. & M.* 717; S. C. 1 *Ad. & E.* 608.

In a subsequent case, it was held that a Court of error ought not to amend the record of the Court below;

AFTER verdict in an inferior Court, and costs taxed, but before final judgment signed, an amendment in the declaration was allowed, and the transcript was sent up on a writ of error, in the amended form. The superior Court refused a rule to amend the transcript, by making it conformable to the record in the original action, as having no power to alter the record of another Court, the transcript being, in contemplation of law, the record.

FRANCE *v.* PARRY, T. T. 1834. K. B. 1 *Ad. & E.* 615.

unless, perhaps, to make it conformable to the facts.

A COURT of requests' act provided that the defendant might plead that he was liable to be warned there, and that, if the judge who tried the cause should not in open court certify a probable cause of action beyond 40*s.*, or that title to land came in question, the plaintiff should be nonsuited. The judges of the court being the mayor and bailiffs, but assisted by the recorder, who was not, however, a judge of the court, and the latter alone having signed the certificate, upon the transcript of the record being sent upon error under the seal of the court, but not shewn to the judges of the court below; upon motion to amend the transcript, conformable to the act—

The Court refused, as it would not then be conformable to the facts.

GREEN *v.* MILLER, T. T. 1831. K. B. 2 *B. & Ad.* 781.

The Exchequer Chamber will only amend for misprision of the clerk,

IN replevin, there were two pleas in bar. On error, it was collected, from an expression which fell from the Court, that the pleas were bad. A rule nisi was accordingly obtained for liberty to withdraw the pleas and plead them de novo, with two additional pleas to each cognizance.

Lord *Tenterden.*—An amendment to this extent cannot be allowed. The power to amend given by 14 Edw. 3, st. 1, c. 6, is confined to misprisions of a clerk in writing one syllable or letter too much or too little; and the 9 Hen. 5, st. 1, c. 4, made perpetual by 4 Hen. 6, c. 31, recites the first-mentioned statute, and empowers the justices to amend such defects as well after judgment as before. But the question is, has there been any misprision of the clerk in this case? Certainly not. The word "clerk" imports some officer of the Court coming within that description. The misprision here is, that the party, his counsel or attorney, having pleaded two pleas, doubtful, if not bad, the application is to introduce new matter; and how could we prevent its leading to a new issue in this Court? We have not the power to do it.

MELLISH *v.* RICHARDSON, E. T. 1831. C. P. 9 *Bing.* 125.

but will not examine the propriety of amendments made by the Court below.

ON a writ of error—

The Court said, it is not competent to a Court of error to examine the propriety of an amendment of the record made by the Court below, being a Court of record, although the order for the amendment is sent up as part of the record.

CARDEN *v.* GENERAL CEMETERY COMPANY, E. T. 1839. C. P. *7 D. P. C.* 425; S. C. 7 *Scott*, 348.—S. P. BECKHAM *v.* KNIGHT, E. T. 1839. C. P. *7 D. P. C.* 409.

The Court cannot, without the consent of parties, strike out issues of fact, in order to enable them to proceed on issues in law.

ON a rule to shew cause why the issues joined in this case, concluding to the country, should not be struck out, with liberty to try them, if necessary, after judgment in error should have been obtained. The application was similar to that which had been made in the case of *Beckham* v. *Knight* (supra). The defendants were desirous of bringing a writ of error, upon the decision of this Court, given upon demurrer to the defendants' plea, in favour of the plaintiff.

Tindal, C. J.—It can only be done by mutual arrangement and consent. We certainly have no power to compel the parties to adopt the course suggested.—Rule discharged.

(*p*) RELATIVE TO THE ERROR BOOKS.

REG. GEN., H. T. 1833. K. B., C. P., & Ex.

Rule, H. T. 4 Will. 4, regulates the error books.

IT is ordered, "That four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies."

(*q*) RELATIVE TO THE ARGUMENT ON*.

REG. GEN., H. T. 1833. K. B., C. P., & Ex.

By Rule, H. T. 4 Will. 4, proceedings in error need not be entered for argument;

IT is ordered, "That no entry or record of the proceedings in error shall be necessary before setting down the case for argument; but after judgment shall have been given in the Court of error in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment-roll remaining in the Court below, on a certificate of a clerk of the errors of the Exchequer Chamber of the judgment given, for which a fee of 3*s.* 4*d.*, and no more, shall be charged."

REG. GEN., H. T. 1833. K. B., C. P., and Ex.

and are to be delivered, not filed.

IT is ordered, "That the assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court."

* The House of Lords will not receive, from the agent of the plaintiff in error, a petition to refer to the Judges the legal points in the case. (*Ricketts* v. *Lewis*, T. T. 1834, C. P., 1 Bing. N. S. 196).

HAWKEY *v.* BORWICK, E. T. 1827. Ex. Chamb. 1 *Y. & J.* 377.

If there be a mistake as to the entry of the verdict, the Court will adjourn the argument, unless the party consent to argue as if the record had been amended.

ACTION on a bill of exchange accepted by W. D. Campbell, payable "at the house of Smith, Payne, & Smith, in London." Judgment having been pronounced by the Court of King's Bench for the defendant in error, a writ of error was brought; and the following errors were assigned:—That no presentment was alleged in the first count, either to the acceptor, or to Smith, Payne, & Smith; that, although the bill was presented at the house of Messrs. Smith, Payne, & Smith, the presentment might have been made to an utter stranger to all the parties; and that the days in the count were material, and should be proved as laid.

The Court said, that, if issues are entered informally, a Court of error will adjourn the hearing of the case, to afford an opportunity for the party to apply to the Court below to amend the record, unless the counsel will consent to argue upon the presumption of such amendment.

ARMSTRONG *v.* LEWIS, M. T. 1834. Ex. Chamb. 2 *C. & M.* 274.

Exceptions improperly put upon the record will not be noticed on error.

ERROR from the Court of Exchequer on a bill of exceptions taken to the directions of Lord *Lyndhurst*, C. B., on the trial of a feigned issue, directed by his Honor the Master of the Rolls.

Lord *Denman*, C. J.—The Court have considered this record, and the exceptions which have been taken; and it has occurred to several of the Judges, that these exceptions are not properly taken, and that no judgment could be given for the plaintiff in error for that reason upon the record.

DOW *v.* CLARK, T. T. 1833. Ex. 1 *C. & M.* 160; S. C. 3 *Tyrw.* 866.

Proceedings on the writ of error must be taken before the return-day.

THE plaintiff, an infant, suing by his prochein amy, was nonsuited, and there being judgment against him for costs, he sued out a writ of error, but did not proceed therein, and, after the return-day of the writ of error, was taken in execution on a capias.

The Court refused to discharge him out of custody, and held that it was not necessary that judgment of non pros should be signed to justify the execution, and that the writ should have been proceeded with before the return-day.

(*r*) RELATIVE TO THE SUM RECOVERABLE.

LANGRIDGE *v.* LEVI, M. T. 1838. Ex. 7 *D. P. C.* 27; S. C. 4 *M. & W.* 337.

Interest at 4*l.* per cent. is to be allowed from the time execution is delayed by writ of error.

BY 3 & 4 Will. 4, c. 42, it is enacted, "That, if any person shall sue out any writ of error upon any judgment whatsoever, given in any Court to any action personal, and the Court of error shall give judgment for the defendant thereon, then interest shall be allowed by the Court of error for such time as execution has been delayed by such writ of error, for the delaying thereof."

A writ of error was brought upon the judgment of the Court of Exchequer, and that judgment was affirmed.

The Court ordered interest to be allowed at the rate of 4*l.* per cent under the 3 & 4 Will. 4.

BURN *v.* CARVALHO, M. T. 1834. K. B. 1 *Ad. & E.* 895.

ON a writ of error, a question arising as to the allowance of interest—

The 3 & 4 Will. 4, c. 42, as to interest upon a writ, is not retrospective.

The Court held, that the terms of sect. 30 of 3 & 4 Will. 4, c. 42, being prospective, only allowing interest for such time as the execution has been delayed by suing out the writ of error, applied only to cases where the writ has been sued out since the act.

(*s*) RELATIVE TO THE JUDGMENT*.

BEST *v.* PRIOR, T. T. 1833. K. B. 2 *D. P. C.* 189.

ON motion for judgment in favour of the defendant in error, the plaintiff in error had not delivered his paper-books in due time, but the defendant in error had delivered them all—

Judgment will be given against the party not delivering his paper-books in time.

Taunton, J.—It is clear from the practice of the Court, that, if the plaintiff in error does not deliver his paper-books, and the defendant does, the latter is entitled to judgment.

WILKINSON *v.* MALIN, M. T. 1832. Ex. 1 *C. & M.* 240; S. C. 1 *D. P. C.* 628.

THE plaintiff in error moved to non pros the writ without payment of costs, relying on the cases of *Salt* v. *Richards*, (7 East, 111), and *Milborn* v. *Copeland*, (1 Man. & Selw. 104), as decisive, that, by the stat. 3 Hen. 7, c. 10, the defendant in error was not entitled to any costs before the return of the writ.

The Court refused to allow a party to non pros his own writ of error without costs†.

* If it be for the plaintiff in error, the judgment is, in case the error be in fact, that the judgment in the original action be recalled; (see 1 Roll. Ab. 805, pl. 9); in case the error be in law, that the judgment be reversed. (See 2 Bac. Ab. 503). If it be for the defendant in error, he being the original plaintiff in the cause, the common judgment in error is, that the judgment be affirmed, and this is the language of such judgment in error, whether the errors assigned shall have been in fact or in law.

In debt for goods sold, plea, nil debet, except as to 1*l.* 12*s.* 5*d.*, and, as to that, tender, the jury in a county court having found that the defendant did not owe any thing, except as to the 1*l.* 12*s.* 5*d.*, and, as to that, certain facts upon which they prayed the judgment of the Court, which was given for the defendant in the Court below, and reversed in error:—Held, that, upon plaintiff releasing damages, the Court of error might enter judgment for the plaintiff for 1*l.* 12*s.* 5*d.*, with the costs of the proceeding in the Court below. (*Finch* v. *Brook*, M. T. 1835, C. P., 2 Bing. N. S. 325).

† Where judgment had been given for the defendant on an argument on demurrer, and the plaintiff brought a writ of error, the Court ordered issues in fact, which were upon the record, to be struck out, with liberty to replace them, in order that the judgment of the Court of error might be obtained before they were tried, by consent of the defendant. (*Beckham* v. *Knight*, 7 Dowl. P. C. 409; 7 Scott, 346; S. P. *Carden* v. *General Cemetery Company*, 7 Scott, 348; 7 Dowl. P. C. 425).

It is no objection to non prossing a writ of error, that the judgment-roll has not been perfected. (*Dunbar* v. *Parker*, T. T. 1820, Ex., 9 Price, 592).

Bayley, B.—The case of *Salt* v. *Richards* was a non pros by the defendant in error; this is a motion to non pros at the instance of the plaintiff himself. He may have a right to non pros, without leave of the Court; but if he require a rule, it seems to me, he applies for the indulgence of the Court, and that it is but reasonable, as he has sued out a writ of error improperly, that the indulgence should be granted on payment of costs. The cases referred to do not say, that no costs are payable; and there is this distinction, that, in the other courts, no expenses are incurred before transcribing, whereas there are in this Court.

(*t*) Relative to the costs*.

Newell *v.* Roake, M. T. 1827. K. B. 7 *B. & C.* 404; S. C. 1 *M. & Ry.* 170.

On error, costs are given by way of damages.

In trespass for an expulsion, and for mesne profits, to which defendant pleaded former recovery in C. P. for the very same trespass and judgment against plaintiff. Replication, that such judgment was reversed on error in K. B. Rejoinder, that the writ of error was returnable before judgment given in C. P., traversing, that, after judgment given, the record was brought into K. B.

The Court held—first, that, upon the issue taken upon such traverse, it was sufficient that it was shewn, by the return made by the Chief Justice of C. P., that the transcript was brought in after the taxation of costs, and the pendency of a writ of error in the Lords did not vary the case; and secondly, that the plaintiff was entitled to recover the costs in error, as between attorney and client, as damages sustained by the plaintiff, by reason of his being kept out of possession.

Cockerell *v.* Cholmeley, H. T. 1830. K. B. 10 *B. & C.* 564.

A writ of formedon is within the meaning of 13 Car. 2, st. 2, c. 2†.

After demurrer to a replication in formedon, the demandant obtained judgment, and upon the trial of several issues in fact, a verdict being found in favour of the demandant, the latter had judgment that he recover his seisin against the tenant; and upon writ of error brought, the common errors being assigned, the judgment was affirmed.

The Court held, that the demandant was entitled to double costs under the 13 Car. 2, stat. 2, c. 2, s. 10.

Wright *v.* Fairfield, T. T. 1831. K. B. 2 *B. & Ad.* 959.

The 13 Car. 2, st. 2, c. 2, as to double costs, does not apply to a case where

The declaration stated, that the bankrupt had entered into a contract with persons acting on behalf of his Majesty to furnish stone and execute masonry as was specified in the said contract, for reward to him in that behalf, it being among other things agreed,

* Where money was paid "in lieu of bail, to satisfy the costs in error:"—Held not to be applicable to the costs of a demurrer disposed of previous to the writ of error being obtained. (*Gwynne* v. *Collins*, 1840, B. C., 9 D. P. C. 70).

† Enacts, that, "if judgment be affirmed after verdict, the plaintiff shall pay to the debtor in error his double costs."

that, on default made by the bankrupt in providing such stone, the other party might determine the contract; that the bankrupt being desirous of obtaining stone for the above purpose contracted for a quantity of stone with the defendant, to be delivered within a specified time, upon certain terms and at a certain rate; and that in consideration of the promise of the bankrupt to perform the agreement on his part, the defendant, Wright, promised to fulfil the same on his; that the bankrupt was ready to perform the several matters by him promised, but that the stone was not delivered by the defendant; by reason whereof the bankrupt before his bankruptcy became and was unable to fulfil his contract. The defendant pleaded non assumpsit; a verdict passed for the plaintiff, and judgment was given thereon. The defendant assigned general errors.

the debt and costs have been deposited at a banker's of the opposite attorney, so as to avoid execution.

The Court held, that the 13 Car. 2, stat. 2, c. 2, s. 10, giving double costs to the defendant in error on affirmation of the judgment, did not apply to a case where the debt and costs had been paid into the opposite attorney's hands to avoid execution, with notice to retain it.

RICKETTS *v.* LEWIS, H. T. 1834. K. B. 1 *B. & Ad.* 197.

THIS was a writ of error from the Common Pleas. The action was in trespass. The defendant pleaded several pleas; one of which it was admitted was good, and covered the declaration. Issues were joined on those pleas, and ultimately judgment was given generally for the defendant, and his costs were taxed. The defendant being allowed by the Master his costs upon the writ of error, a rule was afterwards obtained to shew cause why the entry of the judgment as to those costs should not be stayed, on the ground that it had been expressly decided in *Golding* v. *Dias,* (10 East, 2), that the stat. 8 & 9 Will. 3, c. 11, s. 2, which gave costs in error to a defendant, applied only to judgments given in demurrer in the Court below.

The words, "such action," in 8 & 9 Will. 3, c. 1, s. 2*, apply in all cases of error after judgment for the defendant in any action in any Court of record.

Per Cur.—This rule was obtained upon the authority of *Golding* v. *Dias,* (10 East, 4), in which the Court certainly held, that the statute in question related only to judgments given on demurrer in the Courts below. The material clause is as follows: "And forasmuch as for want of a sufficient provision by law for the payment of costs of suit, divers evil-disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts; be it enacted, that if any person shall commence or prosecute, in any court of record, any action, &c., wherein upon any demurrer, either by plaintiff or defendant, &c., judgment shall be given by the Court against such plaintiff; or, if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff shall sue any writ of error to annul the said judgment, and the judgment shall afterwards be affirmed to be good, or

* Enacts, that, "If at any time after judgment given for the defendant, in any action, plaint, or suit, in any court of record, the plaintiff or demandant shall sue out any writ or writs of error to annul the said judgment; and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit thereon, the defendant in error shall have judgment to recover his costs against the plaintiff or demandant, and have execution for the same by capias ad satisfaciendum, fieri facias, or elegit."

the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein, the defendant in every such action shall have judgment to recover his costs against every such plaintiff, and have execution for the same?" Upon considering this clause, we think the words, "such action, plaint, or suit," mean, in the ordinary construction of the words, "any action, plaint, or suit, in any Court of record;" and do not refer to the whole of the sentence which precedes, so as to confine the remedy to those actions, &c. in courts of record, in which judgment is given against the plaintiff upon demurrer.

REG. GEN. T. T. 1832. Ex. Chamb. 3 *Tyrw.* 666.—S. R. 2 *C. & J.* 685.

Costs of proceedings in Exchequer Chamber to be taxed by the Master of the Court of Exchequer.

IT is ordered, "That henceforth the costs of proceedings upon writs of error from the Court of Exchequer to this Court, be taxed and allowed by the Master of the Court of Exchequer."

FRANCIS *v.* DOE, 1839. Ex. Chamb. 5 *M. & W.* 272; S. C. 7 *D. P. C.* 523.

Application to review taxation of costs in error must be to the Court of error.

C. H. LET certain mills to a company, and subsequently became a partner in it. Notice to quit having been given by him to the company, an ejectment was brought against one of the members, who defended for the rest on the demise of C. H., he continuing a partner at the date of the demise. After verdict and judgment for the plaintiff, and error brought, and judgment affirmed, a rule was obtained, calling on the plaintiff in error to shew cause why the Master should not review his taxation. He had allowed to the defendant in error double costs of the proceedings from the time of suing out the writ of error until the affirmance of the judgment; but considered that the costs of settling the bill of exceptions were not costs in error but costs in the Court below, and had also disallowed the double costs of the writ of inquiry of mesne profits. *Gardner* v. *Baillie*, (1 Bos. & Pul. 32), and *Shepherd* v. *Mackreth*, (2 H. Bl. 284), were referred to as justifying the claim of the defendant in error to double costs in both respects, whereas the Master had disallowed them under stat. 13 Car. 2, st. 2, c. 2, s. 10, and 16 & 17 Car. 2, c. 8, s. 4.

Tindal, C. J., subsequently said, that, in reference to the statutes and cases cited, the Court were of opinion, that the defendant in error was entitled to double costs as prayed for, and the motion to review was properly made to the Court of error.—Rule absolute by consent.

(*u*) RELATIVE TO THE EXECUTION*.

* The sum for which execution is to be taken out may include the sum recovered in the original action as well as the damages and costs in error, or for those alone, by fieri facias, elegit, or capias ad satisfaciendum; (see 2 Saund. 101, n.); and also by levari facias, which is, indeed, in the nature of a writ of fieri facias, judgments must be executed in those Courts in which they are given; (see Bac. Ab. 721; Cowp. 843); and where a writ of error determines in the Exchequer Chamber by abatement or discontinuance, the judgment is not again in K. B. till there be a remittitur entered; for, without a remittitur, it cannot appear to the

(*v*) Relative to the restitution*.

(*w*) Relative to the setting aside and quashing.

Aarons *v.* Williams, T. T. 1824. C. P. 2 *Bing.* 304.

Admission by one of several defendants, that error has been brought for delay, cannot prejudice the other.

One of many defendants who had severed in defence, sued out a writ of error. One of the other defendants made an admission, that the writ was sued out for delay. On motion to set it aside—

Per Cur.—The case of *Ellis* v. *Sweet*, (E. T. 1824, K. B.), does not bear on the present case, and if it did, it is a question, whether or no we should adopt it; but that case is distinguishable, because it was an action by many joint plaintiffs, whereas the defendants in this action have severed; one of them has purchased his writ of error, which is a writ of right; and though the Courts have interfered, where the party making the admission of delay was the party who sued out the writ, they will not interfere in other cases.

Denn *v.* Roak, H. T. 1825. K. B. 5 *B. & C.* 735, n.

After judgment reversed, it is too late to apply to quash the writ of error for irregularity.

The plaintiff, on the 20th, sued out his writ of error in K. B., returnable in fifteen days from the day of Easter. On the 20th of April, 1825, the defendants served the plaintiff with a rule to transcribe, and the transcript was completed in due course. On the 18th of June, the defendants taxed their costs, and on the 14th of the same month (Trinity Term) signed judgment. In Michaelmas Term, 1825, the defendants served the plaintiff with a rule to assign errors; and the plaintiff having delivered his assignment of errors, the defendants in the same term delivered the joinder in error. The case was afterwards argued, and the judgment of the Court of Com-

Court but that the writ of error is still pending in the Exchequer Chamber; (see Salk. 261); and if the writ of error abate by motion, it is said to be usual for the plaintiff to move the Court, on an affidavit of the fact, for leave to enter a remittitur, and take out execution. (See 1 Salk. 264). But where judgment is affirmed in error coram nobis, or from C. P., or an inferior Court, returnable in K. B., the execution may issue immediately out of that Court, for the record remains there, or is supposed to be removed thither; (see Cowp. 843); but on error to Parliament from K. B., a transcript only goes up, and the record only is supposed to be sent back again to K. B.; and if the judgment be affirmed, K. B. may amend execution, and that on a writ of error from C. P., though the transcript only is removed, K. B. may amend execution. (See 3 T. R. 657).

* On the reversal of the original judgment, the defendant is entitled to restitution; hence, if a man recover damages, and has execution by fieri facias, and on the fieri facias the sheriff sells to a stranger for a term of years, and afterwards the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; (see 2 Bac. Abr. 505); but, if the goods of an outlaw are sold under a capias utlagatum, and afterwards the outlawry, by writ of error, is reversed, he shall be restored to the goods themselves. (Id.; and see Cro. Jac. 699). And where personal goods are delivered to the party for rationabile pretium extentum, upon the reversal of the judgment he shall be restored to the goods themselves. (See Roll. Ab. 778). It seems that a collateral judgment shall not be reversed, though the principal one be; for if, after judgment on a scire facias against bail, the judgment against the principal is reversed, this is no revival of the judgment against the bail. (See 2 Bac. Ab. 506).

mon Pleas was reversed, and the plaintiff afterwards taxed his costs. On motion to quash the writ of error, on the ground that it was returnable before costs in the Court below were taxed, and consequently before any judgment was given in that Court—

Abbott, C. J.—The defendants ought, in an earlier stage of the proceedings, to have applied to the Court to quash the writ of error. But they have joined in error, and, by their counsel, have appeared upon argument, and the judgment of the Court of Common Pleas has been actually reversed. They are much too late, therefore, to quash the writ of error.

(*x*) Relative to the repleader*.

II. IN CRIMINAL PROCEEDINGS. See also *Particular Heads*, and tit. *Indictment*.

Wright *v.* Rex, 1834. Ex. Chamb. 3 *N. & M.* 892; S. C. 1 *Ad. & E.* 434.

A Court of error, under 11 Geo. 4 & 1 Will. 4, c. 70, has jurisdiction over judgments in the K. B. in criminal matters.

In an indictment for a nuisance, it was alleged that the defendant, at the township of W., incroached upon a highway there, (*i. e.* at the township of W.), leading from a highway in the said township, leading from the village of W. toward C. to another highway in the said township, from the village of W. to the township of X., by a certain wall there extending into the said highway, and erected by the defendant. After judgment on error—

The Court held, that the Court of Ex. Chamb. has jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, to correct errors in judgments in the King's Bench in criminal cases.

Escape.

I. RELATIVE TO CIVIL CASES.

(*a*) What amounts to.

1. *In general*, p. 613.

2. *In particular*.

1.—*On Mesne Process*, p. 613.

2.—*On final Process*, p. 614.

(*b*) Rule calling on the marshal to produce, p. 614.

* A Court of error cannot award a repleader. (*Gwynne* v. *Lord Thynne*, 2 Scott, N. S. 711; S. C. 6 Bing. N. S. 453).

I. RELATIVE TO CIVIL CASES—(*continued*).

(*c*) REMEDY FOR.

1. *By Action.*

1.—*By and against whom maintainable*, p. 614.

2.—*Declaration.*

1. *Title of*, p. 615.
2. *Venue*, p. 615.
3. *On Mesne Process*, p. 615.
4. *On final Process*, p. 616.

3.—*Particulars of Demand*, p. 617.

4.—*Pleas*, p. 617.

5.—*Evidence*, p. 618.

6.—*Damages*, p. 620.

7.—*Judgment*, p. 620.

8.—*Costs*, p. 620.

2. *By Attachment*, p. 621.

3. *By Information*, p. 621.

II. RELATIVE TO CRIMINAL CASES, p. 621.

I. RELATIVE TO CIVIL CASES.

(*a*) WHAT AMOUNTS TO.

1. *In general**.

2. *In particular.*

1.—*On Mesne Process*†.

DOE *v.* TRYE, T. T. 1839. C. P. 9 *D. P. C.* 636; S. C. 5 *Bing. N. S.* 573.

No action lies for an escape

IN an action for an escape, it was proved that the agent of the plaintiff requested that the warrant for the arrest of the prisoner

* To constitute an escape, it is not material whether it be voluntary, that is, arising from the express consent of the gaoler; or be negligent, that is, where the prisoner escapes through the want of proper care or diligence of the gaoler, but without his assent or knowledge. (See Petersdorff's Sup. Bla. 125).

† As the sheriff was not bound to carry a prisoner on mesne process to gaol before the return of the writ, he was not guilty of an escape by omitting to do so after the return, unless the plaintiff was thereby delayed. (*Planck* v. *Anderson*, M. T. 1792, K. B., 5 T. R. 37).

If a party be arrested on a writ of mesne process, the sheriff, after the time for

where the arrest is made as pointed out by the plaintiff.

might be directed to a particular officer; that he gave instructions to that officer, and afterwards took him and his assistant to the place where the caption was to be made, and then required him to execute the warrant in a certain manner.

The Court held, that, where an arrest is illegally made by the direction and under the inspection of the plaintiff's attorney or agent, and the prisoner afterwards makes his escape, the sheriff is not liable in an action for such escape, although it is not actually decided, that the officer making the arrest is the plaintiff's special bailiff.

2.—*On final Process**.

(*b*) Rule calling on the marshal to produce†.

(*c*) Remedy for.

1. *By Action.*

1.—*By* ‡ *and against whom maintainable.*

De Vaux *v.* Sewell, H. T. 1828. C. P. 1 *M. & P.* 216; S. C. 3 *C. & P.* 182.

The serjeant-at-mace, who

A mandate from the Lord Mayor's Court was directed to the defendant, requiring him to arrest A. and B., at the suit of the plain-

putting in bail has expired, is bound to keep him in arctâ et salvâ custodiâ, and if he allow him to go abroad, it is an escape. (*Williams* v. *Mostyn*, 4 M. & W. 145).

A sheriff is bound to keep prisoners in his custody after the return of mesne process, and before they are charged in execution, in arctâ custodiâ in his gaol. Therefore, where a party being arrested continued in the custody of the sheriff, and, after the expiration of the time for putting in bail, went in charge of a sheriff's officer to the court of a revising barrister:—Held, that this was an escape; but, in the case of an escape on mesne process, no action can be maintained, unless the plaintiff can prove some damage. (*Williams* v. *Mostyn*, M. T. 1838, Ex., 7 D. P. C. 38).

* If a defendant in execution be at large for the shortest time possible, even before the return of the writ, (*Hawkins* v. *Plomer*, H. T. 1715, C. P., 2 Blac. 1048), and whilst in the company and under the control of the officer, it is an escape. (*Benton* v. *Litton*, E. T. 1796, C. P., 1 B. & P. 24). Permitting a defendant, in the custody of the sheriff, against whom a ca. sa. has been lodged, to go out of prison, is a voluntary escape, although the act of the sheriff was caused by mistake. (*Filewood* v. *Clement*, E. T. 1838, B. C., 6 D. P. C. 508).

† The marshal, on being served with the side-bar rule, to produce or acknowledge the defendant to be in his actual custody, or shew cause to the contrary, within a limited time, is bound to give notice of an escape before that time expires; but, upon his tendering an admission of the escape, to be embodied in the rule, the Court discharged a rule for an attachment. (*White* v. *Stratton*, H. 1833, B. C., 1 D. P. C. 550).

‡ No action can be maintained against the sheriff for the escape of a prisoner in custody on mesne process, unless the plaintiff has sustained actual damage, or his suit is delayed thereby. (*Williams* v. *Mostyn*, 4 Mee. & W. 145).

tiff. A. was accordingly arrested by the defendant's deputy, and taken to a lock-up-house, from which he was suffered to escape. Bail were tendered shortly afterwards to the clerk of the bails of the Lord Mayor's Court, but were rejected, because they refused to become bail for B. also (who was out of the country); it being the practice of that court to require bail in joint actions for all the defendants, although only one be arrested. In an action for the escape of A.—

takes a prisoner on process out of the Mayor's Court to a lock-up, is liable for his escape.

The Court held that the serjeant-at-mace was liable, notwithstanding the refusal of the Court to take the proffered bail.

2.—*Declaration.*

1. *Title of**.

2. *Venue.*

JENKINS *v.* LAWRENCE, T. T. 1830. C. P. 12 *Moore*, 230.

In an action against a sheriff's officer, the Court will not allow it to be tried in his own county.

IN an action against a sheriff for an escape—

The Court refused to allow the venue to be changed to the county in which the escape took place, although it was sworn that all the witnesses resided there.

---

3. *On Mesne Process.*

ELVIN *v.* DRUMMOND, M. T. 1830. C. P. 12 *Moore*, 523.

A variance as to the date of the process under which the party was in custody is immaterial†.

DECLARATION in an action against the sheriff for an escape. It was alleged that the party was taken under a certain writ "of the King," called a ca. sa., issued on 8th May, 1826; but the writ produced was in the name of Geo. 3, but tested Sir *W. D. Best*, Knight, 8th May, in the seventh year, &c.; indorsed "May 13th, 1826."

The Court held that the variance was immaterial, and that the sheriff having acted under the writ could not afterwards treat it as a nullity.

BEVAN *v.* JONES, T. T. 1825. K. B. 4 *B. & C.* 403; S. C. 6 *D. & R.* 483.

The commitment must be stated with certainty in the declaration, and proved as laid.

IN an action against the marshal for an escape, the declaration, after stating the arrest, alleged that bail came before a Judge at chambers, and acknowledged &c., prout patet &c.; that the defendant afterwards surrendered in discharge, and was committed to the marshal, and afterwards escaped; in proof of which, the entries of

* Before the new rules, where the bill against the marshal for an escape was intitled by mistake generally, and demurrer, for that the cause of action appeared to have accrued after the first day of term, the Court allowed the declaration to be amended on payment of costs, notwithstanding it was shewn by affidavit that the prisoner had, on 21st November, returned into custody. (*Brazier* v. *Jones*, H. T. 1827, K. B., 6 B. & C. 196).

† In case against the sheriff for an escape, the declaration stated that the plaintiff sued out an attachment of privilege, "by which said writ our lord the King commanded the defendants, &c., to attach A. B. &c., to answer the said

a recognizance of bail, and of special bail in the filacer's book, were produced,—the former of which purported to have been taken in Court at Westminster; and the latter, that the bail was put in before the Judge, but did not state whether it was put in at Chambers or in Court.

The Court held that such entries did not support the allegation, and that such allegation was not mere matter of inducement, inasmuch as the validity of the commitment depended on the render, which could not have been made until bail above put in.

---

4. *On final Process.*

ELVIN *v.* DRUMMOND, H. T. 1827. C. P. 4 *Bing.* 278.

A sheriff who has acted under a writ cannot object on the ground of a variance.

IN an action against the plaintiff for an escape, the declaration set out a writ of our lord the King; and on its production, the writ was found to be intitled, by mistake, 7 Geo. 3:—Held, not to be a variance; or, at all events, not one that the sheriff could take advantage of, he having recognized the writ, by making a return to it.

BRAZIER *v.* JONES, E. T. 1828. K. B. 8 *B. & C.* 124; S. C. 2 *M. & R.* 88.

The party must be shewn to have been legally in custody.

IN an action for an escape, upon an attachment for not performing an award, the plaintiff alleged in his declaration that there were mutual bonds of submission, but failed in proving this fact, and proved the rule of Court ordering the attachment, but had not set it out in his declaration.

Per Cur.—In an action for an escape, if it be an escape upon mesne process, you must allege and prove a debt. If it be an escape upon process in execution, you must allege and prove a judgment. The plaintiff in this case has not done either; he has shewn no debt, for the award alone would not do; he alleged a mutual submission; he has not proved it; he has alleged no judgment at all.

BROMFIELD *v.* JONES, T. T. 1825. K. B. 4 *B. & C.* 380; S. C. 6 *D. & R.* 500.

In a declaration against Marshal for an escape on a judgment, the allegation as to a sci. fa. need not be proved.

THE declaration on an escape against the Marshal alleged the judgment in Easter Term against one W., and in Trinity Term in the year aforesaid, such proceedings &c.; that it was considered by the same Court that the plaintiff should have his execution against the said W. &c.; and thereupon, on &c., the said W. was committed &c. Upon objection, that no judgment in sci. fa. was proved—

The Court held that the allegation of execution by sci. fa. being unnecessary, need not be proved; and that the words thereupon &c., amounted only to an allegation of fact, and not to a description of the record on which the commitment took place.

plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of 30*l.*," &c. The writ produced did not contain the words, "to the damage" &c.: —Held no variance. (*Cousins* v. *Brown*, T. T. 1825, N. P., 1 Ry. & M. 291).

3.—*Particulars of Demand.*

DAVIS *v.* CHAPMAN, E. T. 1837. K. B. 1 *N. & P.* 699.

THIS was an action for an escape against the Marshal, and the writ was served on the 23rd of February. A summons was taken out, returnable before the Lord Chief Justice, who afterwards made an order that the plaintiff should deliver an account in writing of the particulars of the alleged escape or escapes for which this action was brought, specifying the time and place. On motion to rescind the order—

The Marshal is entitled to a particular of the precise day of the escape, or best information which can be given.

Per Cur.—This order cannot be rescinded; it is in its correct form. If the plaintiff does know the time and place of escape, he ought to communicate it; indeed, he must give the particulars in the best manner he can.

4.—*Pleas**.

DAVIS *v.* CHAPMAN, E. T. 1839. C. P. 5 *Bing. N. S.* 453; S. C. 7 *D. P. C.* 429; S. C. 7 *Scott*, 458.

TO an action against the Marshal for the escape of a prisoner charged in execution, plea, that the prisoner, after his commitment, wrongfully, privily, and without the permission or consent of the defendant, escaped from and out of his custody to places to him unknown, and afterwards, and before the commencement of the suit, voluntarily and of his own accord, and without the knowledge of the defendant, returned back again into the custody of the defendant, who then kept and detained, and still doth keep and detain him, without an allegation denying all knowledge, on the part of the defendant, of the escape, or of where the party was to be found in the interval between the escape and his voluntary return—

A plea, that the party escaped without gaoler's knowledge, and remained at places unknown to him, and voluntarily returned, must deny knowledge during any portion of the period.

The Court held the plea bad, but gave leave to amend.

MERRY *v.* CHAPMAN, M. T. 1839. Q. B. 8 *D. P. C.* 81; S. C. 3 *P. & D.* 25; S. C. 10 *Ad. & E.* 516.

A PLEA to an action for an escape against the Marshal of the Queen's Bench Prison, stated, that the plaintiffs fraudulently and covinously conspired with Q. and others to arrest A. B., (a prisoner on final judgment within the rules, at the suit of the plaintiffs), if

The defendant may plead that the prisoner was detained by trick and con-

* The Marshal may plead that the prisoner escaped through the fraud and covin of a party to whom the judgment had been assigned; (*Hiscocks* v. *Jones*, M. T. 1829, N. P., 1 M. & M. 260); but to a declaration against the bailiff of a liberty, alleging an arrest under a mandate and an escape, a plea against the further maintenance of the action, that after the commencement of the suit the plaintiff had returned cepi corpus, pleaded by way of estoppel, was held ill. (*Jackson* v. *Hill*, E. T. 1838, Q. B., 2 P. & D. 455).

The plaintiff's attorney, as such, has no general authority to order the discharge of the defendants in execution, without payment of the debt; therefore, in an action against the Marshal for an escape, it was held, that he could not justify the discharge of such a defendant, under the order of the plaintiff's attorney, without shewing, either that the plaintiff had authorized the order, or that the debt had been paid. (*Savoury* v. *Chapman*, T. T. 1840, Q. B., 8 D. P. C. 656; S. C. 3 P. & D. 604; S. C. 11 Ad. & E. 829; abr., ante, tit. *Arrest*).

trivance, so as to sue the Marshal; but he cannot plead that the prisoner, if not so detained, might have returned before action brought.

he should go beyond the limits of the rules, and detain him beyond the limits till the Marshal could be served with process for the escape; and the proof was, that one W., at whose suit also the prisoner was detained on mesne process, by trick and contrivance, caused the prisoner to be arrested at the suit of C., and detained beyond the limits of the rules, during which time W. served the Marshal with a writ in the present action, and facts were proved to shew a connection between W. and the plaintiffs:—Held, that, as the plaintiffs adopted W.'s agency, by prosecuting this action, it was a question for the jury, whether the plaintiffs were not parties to his trick and contrivance, although they did not personally interfere in it. Another plea alleged, that, while A. B. intended and was about to return to the said rules, the plaintiffs, and others in collusion with them, in further pursuance of the fraudulent contrivance, &c., wrongfully caused A. B. to be arrested and detained until a writ could be sued out and served on the Marshal in this action; and alleged, that, had not A. B. been so collusively and illegally arrested and detained, he could have returned to and been within the rules before the commencement of the suit.

The Court held, that, on this plea, the plaintiffs were entitled to judgment non obstante veredicto.

LANE *v.* CHAPMAN, E. T. 1840. Q. B. 3 *P. & D.* 668; S. C. 11 *Ad. & E.* 966.

And in an action on an illegal document in the hands of a bonâ fide holder, if the defendant escapes the Marshal cannot raise the objection*.

THIS was an action against the Marshal for an escape. It appeared that the plaintiff, a bonâ fide indorser of a bill, accepted for a gaming debt, ignorant of the consideration, sued upon it, and the defendant gave a cognovit, upon which judgment was signed, and the defendant taken in execution, but he afterwards escaped from the custody of the Marshal.

The Court held, that, not being a voluntary judgment given as a security, but obtained adversely by an innocent party, it was not void under 16 Car. 2, c. 7, 9 Ann. c. 14, s. 1; and the Marshal, therefore, liable; if it had been void, he might have taken advantage of it as a defence to the action against him.

5.—*Evidence*†.

BLOWER *v.* HOLLIS, H. T. 1833. Ex. 1 *C. & M.* 393.

An order for an attachment is

DECLARATION for an escape contained two counts; the second count alleged, "that, before the committing of the grievances, &c.,

* Semble, in an action against a sheriff for an escape, he stands in the same situation as the original defendant, and may reduce his liabilities by any equities which the defendant would have had against the plaintiff. (*Evans* v. *Maners*, H. T. 1841, Ex., 9 D. P. C. 256).

† To an action against the Marshal for an escape, the defendant pleaded that, after the alleged escape of the prisoner, he, before the commencement of the suit, and before the defendant had notice of such an escape, voluntarily, and of his own accord, returned again into the custody of the defendant; and that he, the said defendant, did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and before and at the commencement of this suit kept

to wit, on &c., a certain other suit or cause had been and was depending in his said Majesty's Court of Exchequer between the said E. T. and the said plaintiff." The plaintiff gave in evidence examined copies of the decree, and the Master's certificate for the costs; the subpœna, payment of the costs, and proof of a demand and refusal of them; of the order for, and issuing of, the attachment, the delivery thereof to the defendant, and the arrest and escape of E. T.

primâ facie evidence of the allegation, "that a suit had been pending."

Per Cur.—We are of opinion, that the order for the attachment for non-payment of costs was of itself sufficient primâ facie evidence in support of the allegation in the second count, that a suit had been pending. It must be taken, that the Court would not have made the order for an attachment unless a suit had been pending.

HOLDEN *v.* RAPHAEL, M. T. 1835. K. B. 4 *Ad. & E.* 228; S. C. 5 *N. & M.* 655.

To a declaration against the sheriff for an escape on mesne process, defendant pleaded, that, before the alleged escape, and before the expiration of eight days from the arrest, he took a bail-bond, duly subscribed with a condition, according to the form of the statute, &c.

If the declaration allege, that a bail-bond was taken, the bail-bond when produced must correspond with the allegation.

The Court held, that the defendant did not support his issue, by producing a bail-bond, which was regular in all respects, except that, in the recital of the condition, the writ, &c., was said to have been delivered "to the said ———," and that, in the operative part of the condition, the words were, "if the said ——— do cause special bail, &c.," the prisoner's name being omitted in those two places only.

NECK *v.* HUMPHREY, E. T. 1835. K. B. 4 *N. & M.* 707; S. C. 3 *Ad. & E.* 130.

IN an action against a sheriff for the escape of a prisoner, arrested on mesne process, the plaintiff proved the arrest by producing the sheriff's return of cepi corpus et paratum habeo.

A return of cepi corpus, and subsequent statements, that no bail-bond was taken, may be left to the jury as evidence of an escape.

The Court held, that the latter words of the return produced by the plaintiff did not preclude him from proving the escape by parol evidence, that the prisoner was at large after the return, and no bail-bond lodged with the sheriff. A return of cepi corpus, coupled with evidence of an answer received at a sheriff's office, that no bail-bond was executed, is evidence to go to the jury, in an action against the sheriff for the escape.

FOX *v.* JONES, H. T. 1828. K. B. 7 *B. & C.* 732; 1 *M. & Ry.* 570.

THIS was an action against the Marshal for an escape. A writ of habeas corpus, touching the custody of the prisoner, had been taken out in the course of the proceedings against him; and that habeas corpus remained, with the prisoner, in the Marshal's hands.

In an action against the Marshal for an escape, the Court allowed

and detained, "and still doth keep and detain the prisoner in his custody as such Marshal, in execution, at the suit of the plaintiff:"—Held, that, under the terms of the plea, evidence of an escape since the commencement of the suit was inadmissible. (*Davis* v. *Chapman*, E. T. 1841, B. C., 9 D. P. C. 645).

the plaintiff to inspect the habeas corpus.

Lord *Tenterden*, C. J.—All that is desired in this case is an opportunity to see the writ. There can be nothing more reasonable; and in this respect we grant the application that the Marshal be ordered to produce it.

DAVIS *v.* BROWN, M. T. 1826. C. P. 9 *Moore*, 778.

But the C. P., in an action against the Warden, refused the plaintiff an inspection of the habeas corpus or committitur*.

IN an action against the Warden of the Fleet for the escape of a prisoner committed to his custody in execution—

The Court held, that the party at whose suit he was committed, cannot call for an inspection of the writ of habeas corpus and return thereto or of the committitur; nor is the Warden bound to furnish copies of them, as all the proceedings under which a prisoner is charged in his custody are incorporated in the list of causes under which he is detained, and which are deposited with the clerk of the papers of the prison.

6.—*Damages*†.

7.—*Judgment.*

GEAST *v.* ELWES, E. T. 1836. K. B. 6 *N. & M.* 433; S. C. 5 *Ad. & E.* 118.

Under the 3 & 4 Will. 4, c. 42, s. 24, the Court will give judgment according to the finding.

DECLARATION against sheriff for an escape. Pleas, not guilty, and that the defendant did not arrest. Issues thereon. At the trial the plaintiff's evidence shewed that the defendant had not arrested, but had negligently omitted to do so. The Judge would not amend the record under stat. 3 & 4 Will. 4, c. 42, s. 23, but allowed the case of negligent omission to be proved. The jury found the fact of omission specially, and assessed the damages at 30*l.*, and a verdict was entered for the defendant on both issues, and the special finding indorsed on the record under sect. 24.

The Court held, that this Court might give judgment for the plaintiff according to the right of the case, the variance being immaterial and the defendant not prejudiced.

8.—*Costs.*

GUEST *v.* CLEVES, E. T. 1837. K. B. 2 *N. & P.* 230.

Declaration for an escape; the

THIS was an action against the sheriff for an escape; but the evidence not establishing that, but an omission to arrest, the Judge

* The allegation of the commitment of the party in the record in the original action held to be primâ facie evidence that the party was committed to the custody of the Marshal in an action against him for an escape. (*Pheney* v. *Jones*, 1835, N. P., 3 C. & P. 333).

† The liability of the sheriff for an escape on mesne process is only for such damages as the party can shew he has sustained by the delay and escape, and costs; and if he can recover his debt against a solvent party the damages are to be diminished accordingly.—Per *Littledale*, J. (*Scott* v. *Henley*, 1832, N. P., 1 M. & Rob. 227).

had refused to allow the record to be amended, but directed the facts to be indorsed, and the Court subsequently gave judgment for the plaintiff according to the right of the case.

Held, that he was entitled to the general costs of the issues found for him, and each to bear his costs of the motion for judgment.

evidence proved an omission to arrest; however, the plaintiff had judgment:—Held, he was entitled to the general costs.

2. *By Attachment**.

3. *By Information†*.

II. RELATIVE TO CRIMINAL CASES‡.

Escheat§.

Escrow. See tits. *Bond—Covenant—Deed.*

* No attachment lies for an escape. (*Gaoler's (of Shrewsbury) case*, 1 Stra. 532).

† An information does not lie for an escape. (*Rex* v. *Williams*, Sayer, Rep. 145).

‡ Any person having another in his custody is guilty of an escape by suffering him to go at large before he has delivered him over to a competent authority to try whether he be guilty or not. (See 2 Hawk. P. C., c. 20, s. 1). In order to make an escape the arrest must be actual, (see 2 Hawk. P. C., c. 19, s. 1; 1 Hale, P. C. 594), and also justifiable; (see 2 Hawk. P. C., c. 19, s. 2); and the imprisonment must be continuing at the time of the escape, and grounded on that satisfaction which the public justice demands for the crime committed. (See 2 Hawk. P. C., c. 19, s. 4; 1 Russ. C. & M. 531). But it is an escape to suffer a prisoner to have more liberty than the law allows. (See 2 Hawk. P. C., c. 19, s. 5). And if a gaoler permit a prisoner to go at large, though he returns, it is an escape, (see Dalt. J., c. 159); for his liability is the same whether the escape be voluntary, (see 2 Hawk. P. C., c. 19, s. 10), or negligent. (See Dalt. J., c. 159). The indictment must state that the defendant was in custody, and that he went at large, and if the escape be voluntary that the defendant feloniously and voluntarily suffered the prisoner to go at large, and must also allege the particular kind of felony with which the prisoner was charged; though, if the indictment be for a negligent escape, it seems such certainty as to the offence is not required. (See 2 Hawk. P. C., c. 12, s. 14).

§ Where land descends to the son of an illegitimate father, who is proved to have been the purchaser thereof, and the son dies seised, intestate and without issue, such land does not devolve upon the heirs ex parte maternâ but escheats to the Crown, notwithstanding the stat. 3 & 4 Will. 4, c. 106, s. 2. (*Doe* d. *Blackburn* v. *Blackburn*, 1836, N. P., 1 M. & Rob. 547).

By 3 & 4 Will. 4, c. 106, s. 2, it is enacted, "That in every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser unless it shall be proved that he inherited the same,"

Essoign. See tits. *Declaration—Ejectment.*

Estoppel*.

See tits. *Ejectment—Landlord and Tenant.*

DOE *v.* SKIRROW, E. T. 1837. Q. B. 2 *N. & P.* 123; *supporting* DOE *v.* PERKINS, 3 *M. & S.* 271.

A woman came into possession under her husband, who had conveyed to the lessor of plaintiff:—Held, that she was estopped from setting up a prior mortgage title.

J. B. CONVEYED Blackacre in fee to L. in 1827, and the wife of J. B. was a party to the deed. It was agreed at the time of executing the conveyance, that J. B. should continue to occupy till he or L. died. L. died, and his heir gave J. B. notice to quit. A few days after the notice to quit expired J. B. died, and his widow continued in possession. On ejectment brought by the heir against the widow—

The Court held, that she could not set up a prior mortgage of Blackacre by J. B., for her possession accrued through J. B., and therefore she was estopped by the conveyance of 1827.

FLEMING *v.* GOODING, T. T. 1833. C. P. 10 *Bing.* 549; S. C. 4 *M. & Scott*, 455.

So, on an agreement between the defendant and the trustees of A. and B., the defendant is estopped from shewing they are the trustees of A. only.

THE defendant under an agreement took the premises of persons described as trustees of A. and B.—

The Court held, that he was estopped from shewing, in an action for use and occupation, that the plaintiffs suing as trustees for A. and B. were in fact trustees only for B., and it not being incompatible with the title set up by way of estoppel, that the plaintiffs might have had a different title at an earlier period.

DOE *d.* BULLEN *v.* MILLS, M. T. 1834. K. B. 4 *N. & M.* 25.

If A. be estopped, and B. enters under him, B. will also be estopped;

A. HAVING built a cottage on a waste, without title, was prevailed on to accept a lease from B., claiming title; and he afterwards upon a consideration of 20*l.* gave up possession to a third party, C. In ejectment by B. against C.—

The Court held, that C. having come in under A., was bound by the estoppel of A., who could not controvert his lessor's title.

* W. purchased from the assignees of G. lands which had been devised to G. as freehold, and which were described as freehold in the conveyance to W.:—Held, that W. was not estopped by the deed as against the widow of G. from shewing that the lands were not freehold and consequently not chargeable with dower. (*Grant* v. *Wainman*, 3 Scott, 413). The part-owner and captain of a ship shipped certain goods upon behalf of A., at Newcastle, and sent the bill of lading to A. The goods were afterwards taken out of the ship by the part-owner:—Held, in an action by A. against the part-owner and the other owners for not carrying the goods, the defendants were not estopped by the bill of lading from shewing that the goods were taken out of the ship, and that it did not sail on the intended voyage, and that A.'s remedy was against the part-owner alone. (*Berkley* v. *Watling*, 2 Nev. & Per. 178).

DOE *d.* MARCHANT *v.* ERRINGTON, M. T. 1839. C. P. 6 *Bing. N. S.* 79; S. C. 8 *Scott*, 210.

but parties holding Bench chambers of Lincoln's Inn not bound by estoppels created by former occupiers.

AN occupier of chambers in Lincoln's Inn conveyed them, with the usual permission given by the trustees of the estates of the Inn, for a valuable consideration, to the lessor of the plaintiff, and subsequently conveyed them, for value, with a similar permission, to the defendant, who took possession—

The Court held that the lessor of the plaintiff was not entitled to recover possession in ejectment, inasmuch as the doctrine of estoppel did not operate, there being no privity of estate between the defendant and the original occupier who conveyed, the privity of estate being between the defendant and the trustees of the Inn.

COWLISHAW *v.* CHESLYN, E. T. 1830. Ex. 1 *C. & J.* 48.

A defendant is estopped from denying a fact alleged in his plea*;

IN trespass, to a plea, that one A. C. was seised in fee, and, by a lost deed, granted a right of way, the plaintiff having, in his replication, traversed the grant—

The Court held that defendant was estopped, by his plea, from contradicting by evidence the seisin in fee of A. C., and that evidence negativing it was not receivable as a ground for the jury to rebut the presumption of a grant.

DOE *d.* SHELTON *v.* SHELTON, E. T. 1835. K. B. 4 *N. & M.* 857; S. C. 3 *Ad. & E.* 265.

but a party executing a deed is not estopped by recitals contained in other deeds.

BY deed, January 26th, 1796, reciting that a sale had taken place under a commission against Brown, the premises in question were conveyed to the defendant; and the defendant, acting upon that conveyance, on the 9th of February, 1796, executed a settlement of the property on himself. The first deed, which recited the bankruptcy, was not signed by the defendant; the second *was*.

The Court held that this was no evidence against him of the bankruptcy; and that he could not, by executing the latter, be said to have adopted and recognized the facts stated in the former deed.

WILSON *v.* BUTLER, T. T. 1827. C. P. 4 *Bing. N. S.* 748; S. C. 6 *Scott*, 540, *by name of* WILSON *v.* WILSON.

So, a recital in a deed, that a certificate is to be final, is not an estoppel;

A COMMITTEE of a joint-stock company were empowered, by a deed executed by defendant and others, to certify what sum was necessary for discharging the debts of the company, and their certificate was to be conclusive as to the amount. The committee certified that 17,986*l.* was necessary, and that 529*l.* was defendant's proportion, which he was called on to pay to plaintiff, as trustee under the deed; of the 529*l.*, defendant had paid 150*l.*, under a former certificate to the same effect, and he was told that credit would be given him for that payment. In an action for the 529*l.*, plaintiff having joined issue on a traverse of an allegation that "the

* A. having obtained a verdict against B., in a case in which B. pleaded a set-off:—Held, that B. was estopped from suing A. in another action for the subject-matter of the set-off. (*Eastmure* v. *Laws*, E. T. 1839, C. P., 7 D. P. C. 431; S. C. 5 Bing. N. S. 444; S. C. 7 Scott, 461; abridged, post, tit. *Set-off*).

committee had certified, as the fact was," that 17,986*l.* was required for payment of the debts of the company—

The Court held that defendant was not estopped from shewing that, by reason of this payment of the 150*l.*, the fact was not that 17,986*l.* was required as aforesaid.

DOE *d.* BUTCHER *v.* MUSGRAVE, T. T. 1840. Q. B. 1 *M. & G.* 625.

or a mortgage-deed, that the house in question was not included.

THE defendant, who was one of the canons of the Queen's chapel of St. George, demised, by way of mortgage, for ninety-nine years, if he should so long live and continue a canon, to the lessor of the plaintiff, " all that the canonry of him, the said R A. Musgrave, of the Queen's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto, and all the rights, rents, emoluments, and appurtenants to the said canonry belonging." On ejectment, brought on the demise of the mortgagee—

The Court held that the defendant was not estopped, by the mortgage-deed, from shewing that the house in question did not belong to the canonry.

SKAIFE *v.* JACKSON, M. T. 1824. K. B. 3 *B. & C.* 421; S. C. 5 *D. & R.* 290.

A receipt is only primâ facie evidence of payment, not an estoppel.

IN assumpsit, it appeared that one of two persons *had* given a receipt to a debtor for the cause of action.

Per Cur.—The question for our consideration is, whether a receipt given by one of two plaintiffs is binding on the other, although it is impeached with fraud, as to that plaintiff and the defendant. The utmost effect that can be given to it is to consider it as an acknowledgment. Now, an acknowledgment may be explained and be shewn to have been given without a consideration. A receipt is nothing more than a declaration in parol, and cannot be pleaded in bar as an estoppel; if it could be taken as a release, still it would be open to the question of fraud, and the real truth might be shewn.

PLUMMER *v.* WOODBURNE, T. T. 1825. K. B. 4 *B. & C.* 625; S. C. 7 *D. & R.* 25.

A plea of a judgment obtained in a colonial court is not an estoppel.

To an action of assumpsit for goods sold and delivered, and for work performed by the plaintiff and his partner, a judgment, obtained in a Court of record in the island of St. Kitts, was pleaded in bar, and by way of estoppel, to the several promises in the declaration. On demurrer—

Per Cur.—We think that this judgment, as now pleaded, is not an estoppel to the claim of the plaintiff. We are ignorant of the law of St. Kitts; we do not know that this verdict is conclusive there; and it would be hard to hold that matter to be final here which would not be so in that place.

Estovers. See tit. *Common.*

Estreats. See tit. *Recognizance.*

Evictions. See tits. *Covenant—Landlord and Tenant—Quiet Enjoyment.*

Evidence.

I. RELATIVE TO EVIDENCE IN GENERAL.

(*a*) Of the party bound to prove the necessary facts, p. 627.

(*b*) Secondary evidence, where admissible, and its effect.

1. *In what Cases admissible, and of the Difference between secondary and defective Evidence,* p. 627.

2. *Preliminary Proceedings to authorize the Admission of secondary Evidence.*

1.—*Proof of, that the highest Evidence cannot be obtained,* p. 629.

2.—*Of the Notice to produce,* p. 629.

(*c*) Presumptive evidence, when admissible, and its effect, p. 631.

(*d*) Hearsay and reputation, evidence of, when admissible, and its effect, p. 632.

(*e*) Parol evidence, p. 632.

(*f*) Admissions.

1. *General Rule,* p. 633.
2. *Of Rule, H. T.* 4 *Will.* 4, p. 635.
3. *By Deed or Record,* p. 636.
4. *In Pleadings,* p. 636.
5. *In Notice to produce,* p. 636.
6. *Where not confirmed at the Trial,* p. 636.
7. *In Criminal Cases,* p. 637.
8. *By particular Persons.*

1.—*By Agent,* p. 637.

2.—*By Assignees,* p. 637.

3.—*By Cestui que Trust,* p. 637.

4.—*By joint Wrong-doer,* p. 637.

5.—*By Party to the Record,* p. 637.

6.—*By Party not to the Record,* p. 637.

7.—*By Stewards,* p. 638.

8.—*By a deceased Party,* p. 638.

I. RELATIVE TO EVIDENCE IN GENERAL—(*continued*).

(*g*) BEFORE JUSTICES OF THE PEACE, p. 638.

(*h*) RELATIVE TO INSTRUMENTS AND PROCEEDINGS, PARTLY PUBLIC AND PARTLY PRIVATE.

1. *Ancient Documents*, p. 639.
2. *Answers in Chancery, &c.*, p. 639.
3. *Bishop's Register*, p. 640.
4. *Exemplifications*, p. 640.
5. *Fleet Register*, p. 641.
6. *Interrogatories*, p. 641.
7. *Lords, House of, Journals in*, p. 641.
8. *Proceedings in a former Cause*, p. 641.
9. *Records*, p. 641.
10. *Remembrancer's Office, Documents from*, p. 641.
11. *Rules of Court*, p. 641.
12. *Sheriff's Office, Documents from*, p. 642.
13. *Tablets in Churches, &c.*, p. 642.
14. *Topographical History*, p. 642.
15. *Writs*, p. 642.

(*i*) RELATIVE TO PRIVATE DOCUMENTS, LETTERS, &c., p. 642.

(*j*) RELATIVE TO DEPOSITIONS, p. 643.

(*k*) RELATIVE TO IMPOUNDING, p. 644.

(*l*) RELATIVE TO NEW TRIALS, p. 644.

(*m*) RELATIVE TO THE COURSE OF PROOF, p. 644.

(*n*) WHERE A WRITTEN DOCUMENT IS DISCLOSED ON EXAMINATION, p. 644.

(*o*) RELATIVE TO IDENTITY, p. 645.

(*p*) RELATIVE TO THE DEATH OF A PARTY, p. 645.

(*q*) RELATIVE TO FOREIGN PROCEEDINGS, p. 645.

(*r*) RELATIVE TO THE MODE OF OBJECTING TO EVIDENCE. See tits. *Demurrer to Evidence—Exceptions, Bill of—New Trial—Nonsuit.*

II. RELATIVE TO EVIDENCE IN PARTICULAR ACTIONS, AND CONNECTED WITH PARTICULAR SUBJECTS. See tits. according to the subject-matter.

III. RELATIVE TO EVIDENCE IN CRIMINAL PROCEEDINGS. See tit. *Indictment*, and particular heads according to the subject-matter.

I. RELATIVE TO EVIDENCE IN GENERAL.

(*a*) Of the party bound to prove the necessary facts*.

(*b*) Secondary evidence, where admissible, and its effect.

1. *In what Cases admissible, and of the Difference between secondary and defective Evidence*†.

Doe *d.* Gilbert *v.* Ross, M. T. 1840. Ex. 7 *M. & W.* 102.

The original deed of settlement was in the hand of the defendant's attorney, who held it as a security from a client for money advanced to him, who, upon a subp. duces tec., refused to produce the deed.

The Court held, that secondary evidence of its contents might be given; for that the statement of its contents by a junior counsel on a former trial could not be received as secondary evidence against the defendant, who was no party to that suit. The general rule is, that wherever the original cannot be produced, parol evidence of its contents may be given, although attested copies may exist.

Whenever the original document cannot be produced, secondary evidence may be given.

Doe *d.* Gilbert *v.* Ross, E. T. 1840. Ex. 8 *D. P. C.* 389.

An attorney having been subpœnaed to produce a deed in his possession, which he had received from a client, refused to produce it on the ground that he had a lien on it for professional business done for the client.

The Court held, that secondary evidence of the deed was admissible. There are no degrees of secondary evidence, consequently parol evidence of the contents of a deed may be given, although an attested copy appears to be in existence.

There are no degrees in secondary evidence.

M'Gahey *v.* Alston, E. T. 1837. Ex. 2 *M. & W.* 212.

A cheque was given to the paying clerk of a vestry, and a corresponding sum appeared to have been paid by the bankers on the same day, whose custom was to return the cheques to the paying clerk, who deposited them in a room in a warehouse; the clerk having gone

Where printed cheques were deposited in a room in a warehouse, and

* The general rule with regard to the onus of proving the issue, is, that the party who asserts the affirmative is bound to prove the issue. (*Moss* v. *Hunter*, M. T. 1790, K. B., 4 T. R. 33). And when the agreement is not to do a particular thing, slight evidence that it was not done suffices. (*Calder* v. *Rutherford*, E. T. 1822, C. P., 3 B. & B. 302).

† There is a distinction between the rejection of evidence by the operation of the rule excluding secondary evidence, and a mere failure or defect in evidence, which is, in itself, admissible. The effect of the rule is, to exclude particular evidence altogether, until proof be given that better evidence is unattainable, and when such proof has been given, to admit the evidence of inferior degree. But evidence tending to the proof may be admissible yet insufficient, and may still be so, although it be proved that better evidence cannot be had.

search was made, and one could not be found:—Held, that secondary evidence might be given*.

out of office, and application made to his successor for inspection, the clerk produced several bundles in which it was likely to be found, and which were searched, but it was not found.

The Court held it to be such reasonable diligence as to let in secondary evidence of its contents.

HUNT *v.* ALEWYN, T. T. 1827. C. P. 1 *M. & P.* 433; S. C. 3 *C. & P.* 284.

If a document be abroad, secondary evi-

IN assumpsit, on a promise by defendant to pay over to plaintiff the proceeds of a foreign bill, negotiated by defendant on plaintiff's account, and which the defendant had admitted by letter—

* Where, at a meeting of the plaintiff and defendant to settle the account, the clerk of the former made the entries into one book, which the defendant copied in another, but no admission was made as to the correctness of the items, but the defendant admitted the balance against him, as stated by the clerk, was correct, but added, that, as he had done many things, there would not be much, if any thing, between them:—Held, that the plaintiff's book would not bind the defendant, so as to require its production, or its absence to be accounted for:—Held, also, that the defendant's admission was evidence of something due on the account stated. (*Rigby* v. *Jeffrys*, H. T. 1839, B. C., 7 D. P. C. 561). So, notice to produce deeds given to the attorney, although the deed may be in his agent's hands, and although it was only alleged to have been delivered by him to the Stamp-office:—Held, that being within the control of the party, the other party might give secondary evidence of its contents. (*Sinclair* v. *Stevenson*, 1824, N. P., 1 C. & P. 582). So, after the lapse of thirty-six years, and every inquiry made, secondary evidence may be of the contents of deeds. (*Rex* v. *Earl Farleigh*, H. T. 1826, K. B., 6 D. & R. 146). But where the witness stated that he had searched in a box where he thought he had put certain letters, but could not find them, adding that he thought they were somewhere in his possession, but that he had not searched for them except in the box:—Held, that it was not sufficient to let in secondary evidence of their contents. (*Bligh* v. *Wellesley*, T. T. 1826, N. P., 2 C. & P. 400). So, where entries were made against the interest of a party who had quitted the kingdom, there being charges of a criminal nature against him, but he was still living:—Held, that it was not sufficient to entitle his declarations to be read. (*Stephen* v. *Gwennap*, 1831, N. P., 2 M. & M. 120).

It is not absolutely necessary that the search for the original document should be made for the purpose of, and shortly before the cause; when made recently after the death of the party in whose possession it had been, although three years before the action:—Held sufficient to let in secondary evidence. (*Fitz* v. *Rabbits*, 1836, N. P., 2 M. & Rob. 60).

If a subscribing witness cannot be found after diligent inquiry, evidence of his handwriting is admissible the same as if he were dead; and it is not necessary to shew that his absence is caused by collusion with the other party. (*Willman* v. *Worrall*, H. T. 1838, N. P., 8 C. & P. 380). So, an examined copy of an entry in the Middlesex registry of deeds, received as secondary evidence of the original, which could not be obtained. (*Collins* v. *Maule*, T. T. 1838, N. P., 8 C. & P. 502).

In assumpsit, on a written agreement, where the attesting witness to the execution was not produced at the trial, it was held sufficient, in order to let in evidence of his handwriting, to prove, by a person who knew him, but had not seen him for eighteen months, that, at the request of the plaintiff's attorney, he had made inquiry for him at coffee-houses and other places where he thought he might hear of him, but without success; and that it was not necessary to shew that inquiry had been made of both the parties who have executed the agreement. (*Evans* v. *Curtis*, T. T. 1826, N. P., 2 C. & P. 296).

The non-production of an original as evidence, although letting in secondary evidence:—Held not to open the door to any loose secondary evidence, as of a paper purporting to be only substantially a copy of the original. (*Everingham* v. *Roundell*, 1836, N. P., 2 M. & Rob. 138). But in debt for penalties for acting as a broker, not being licensed:—Held, that to make the defendant's card evidence, notice should be given to him to produce his cards, and then to prove a copy, or give parol evidence of their contents. (*Clark* v. *Capp*, H. T. 1824, N. P., 1 C. & P. 199). So, where a letter was traced to the defendant's daughter, who was not called:—Held, that it was not sufficient proof of its loss to let in secondary evidence of its contents. (*Parkins* v. *Cobbet*, E. T. 1824, N. P., 1 C. & P. 282).

The Court held, that the parties living abroad who had paid the bill and had possession of it, the plaintiff might treat it as a lost bill; and that parol evidence of its contents were therefore admissible.

dence may be given*.

REX *v.* PIDDLEHINTON, E. T. 1832. K. B. 3 *B. & Ad.* 460.

THE pauper was bound apprentice, there being but one indenture, which was taken by the master. He failed, and his books and papers came to the possession of an attorney, who examined such of them as related to accounts. At that time he saw no indenture. Thirty years afterwards, upon a question as to the pauper's settlement, the foregoing facts were given in evidence; and it also appeared that the master was dead, but his widow was living. No application had been made to her for the indenture.

The Court held, that this was enough to warrant the reception of secondary evidence of the contents of the indenture.

Shewing indenture handed over to a deceased party's attorney, and that he could not find it, and that the party had died, sufficient to let in parol evidence.

DOE *v.* PATTESHALL, T. T. 1832. K. B. 3 *B. & Ad.* 890.

IN ejectment, evidence was given that it was the usual course of business in an attorney's office for the clerks to indorse the particulars of service of notices to quit, and one of the principals, who went out for the purpose of serving such notices, on his return indorsed the service of them, and delivered them so indorsed to his partner.

The Court held, that evidence of these facts, with proof of the death of such principal, was receivable as evidence of the fact of service of the notices.

An indorsement by a deceased clerk on a notice, admissible, when shewn to be the custom of the office.

---

2. *Preliminary Proceedings to authorize the Admission of secondary Evidence.*

1.—*Proof of, that the highest Evidence cannot be obtained*†.

2.—*Of the Notice to produce.*

JONES *v.* EDWARDS, H. T. 1825. Ex. 1 *M'Clel. & Y.* 139.

IN an action between ship-owners, the ownership of one was intended to be proved by means of a letter stated to have been written

Notice to produce letters

* Where the plaintiff was nonsuited for the non-production of a document out of the jurisdiction, and which had been sent for, but did not arrive in time, the Court set aside the nonsuit upon payment of costs. (*Atkins* v. *Owen*, H. T. 1836, K. B., 6 N. & M. 229; S. C. 4 Ad. & E. 819; abr., post, tit. *Nonsuit*). But where a party leaves his attorney to conduct his cause, and goes abroad, the Court will presume all necessary papers are left with him:—Held, therefore, that notice to produce papers, served on the attorney on the evening next but one before the trial, was sufficient to let in secondary evidence. (*Bryan* v. *Wagstaff*, 1824, N. P., 1 Ry. & M. 327; S. C. 2 C. & P. 125).

If a document be handed up to the Judge, and cannot be found afterwards, no search need be made at his chambers. (*Deacon* v. *Fuller*, T. T. 1833, N. P., 6 C. & P. 74).

† Before secondary evidence can be admitted, it must be proved that better evidence cannot be obtained; (*Rex* v. *Culpepper*, M. T. 1695, K. B., Skin. 673; S. P. *Lord Peterborough* v. *Mordaunt*, 1 Mod. 94); and all proper resources from which primary evidence can be procured must be exhausted before secondary evidence can be received; and it must be shewn that diligent search has been made

and copies of letters too general to let in evidence of the letters*.

by her in April, 1815. Proof was given of a notice to her to produce the first letter, in the terms following: "26th of July. Notice to produce letters, and copies of letters; also, all books relating to this cause." It was objected, that this notice was insufficient, from its generality and uncertainty, to entitle the plaintiff to go into parol evidence. *Littledale*, J., suffered the cause to proceed; but—

The Court held the notice insufficient.

STURGE *v.* BUCHANAN, T. T. 1839. K. B. 2 *P. & D.* 573.

Notice, to be available, must be in reasonable time†.

NOTICE was given to produce letters written to the defendant's partners in New South Wales, and upon a summons to admit copies, the defendant agreed to produce his letter book at the trial.

The Court held—first, that proceedings in Chancery having taken place in 1832, when also the action was commenced, in reference to those letters, they were to be presumed to have been received back, and a few days' notice was sufficient.

VICE *v.* LADY ANSON, T. T. 1827. N. P. 1 *M. & M.* 97.

Where letters are in Scotland, a notice to produce on Saturday for Wednesday is too late.

THIS action was brought against defendant as a proprietor in a mining company, for supplies, &c., and she had addressed letters to the directors, in which she spoke of *her shares*, but the letters had been returned to the party, who was then absent in Scotland, though usually resident in London:—Held, that the letters were not so connected with the subject of the action as to found a presumption of their being left in the attorney's hands, and that a notice to produce, served on Saturday for the trial on Wednesday, was not sufficient notice.

in those quarters from which the best evidence was likely to be procured. (*Brewster* v. *Sewell*, H. T. 1820, K. B., 3 B. & A. 296; S. P. *Rex* v. *Johnson*, M. T. 1805, 7 East, 66; *Kensington* v. *Inglis*, H. T. 1807, 8 East, 276).

* Where a document, being scheduled in an answer in a suit in equity, was deposited in that court, and an order made for delivering it to the party:—Held, that it was sufficiently within his control; and that, on failure to produce it on notice, secondary evidence of it might be given. (*Rush* v. *Peacock*, 1836, N. P., 2 M. & Rob. 162).

Where the paper called for was a cheque of the debt, in the hands of his bankers, having been paid:—Held, that it might be called for under the notice to produce, and that the banker's clerk need not be called. (*Burton* v. *Payne*, 1826, N. P., 2 C. & P. 520).

A copy of a notice on a bond is evidence, without notice to produce the original; (*Bartholomew* v. *Stephens*, 1839, N. P., 8 C. & P. 728); but after the opposite party have been called upon, and refused to produce a paper (upon notice given):—Held, that they cannot afterwards put it into a witness's hand, and put any question upon it. (*Doe* v. *Cockell*, 1834, N. P., 6 C. & P. 525).

Where enough is stated in the notice to produce to leave no doubt but that the party must be aware of the particular instrument intended to be called for:—Held sufficient to let in secondary evidence. (*Rogers* v. *Custance*, 1836, N. P., 2 M. & Rob. 179).

A general notice to produce all letters, &c., relating to the matter in dispute:—Held sufficient to let in, as secondary evidence, a particular letter, although not specified as to date. (*Jacob* v. *Lee*, 1836, N. P., 2 M. & Rob. 33).

† A notice to produce papers in a town cause served the evening before at the house of the attorney too late to communicate with his client:—Held too late to let in secondary evidence. (*Byrne* v. *Harvey*, 1836, N. P., 2 M. & Rob. 89).

WHITFORD *v.* TICTIN, H. T. 1834. C. P. 10 *Bing.* 395; S. C. 4 *M. & Scott*, 166; S. C. 6 *C. & P.* 228.

A notice to produce a book which is proved was in the custody of others, is not sufficient to admit parol evidence.

PLAINTIFF acted as secretary to an association under a resolution of the committee, which regulated the terms, salary, &c., of the office, which was passed and inserted in the minute-book of the society, before the plaintiff's appointment. Upon the dissolution of the body, and an action by the plaintiff against the defendants, members of the committee, for the amount of salary—

The Court held a notice to produce the book in question, served on the defendants, and unattended to by them, was insufficient to admit secondary evidence, as such book was not proved to be in their possession, but was in the possession of another late committeeman; and the possession of the latter could not be said to be that of the defendants, the committee being dissolved, and the parties having no longer a common interest.

DOE *v.* HODGSON, T. T. 1840. Q. B. 4 *P. & D.* 143.

After notice to produce, and secondary evidence given, the document cannot be produced.

THE service of a notice upon the defendant's attorney to produce receipts for rent having been proved, they were called for; the defendant refused to produce them. Secondary evidence was then given of their contents, and, on cross-examination, the defendant put a receipt for rent into the hands of the witness, who proved the signature to it to be in the plaintiff's handwriting, but nothing more was then done with it. The plaintiff's case having been concluded, the defendant opened his case, and proposed to use as his evidence the receipt which he had proved. It was objected, that he could not be allowed to do so, after his former refusal, and the learned Judge was of that opinion.

The Court held, that where, in the course of the plaintiff's case, the defendant has refused to produce a paper after notice, and secondary evidence has been given of its contents, he cannot afterwards use the paper as evidence in his own case.

TINN *v.* BILLINGSLEY, E. T. 1835. Ex. 2 *C., M. & R.* 253.

Where a notice not given in time is not objected to, but the party refuses to admit the document, the costs of proving it will be allowed.

A NOTICE to admit the execution of certain documents was given to the defendant's attorney, in London, only four days before the commission-day of the assizes at which the cause was to be tried, and the defendant's agent, on being applied to two days afterwards, refused to admit the execution, without objecting to the sufficiency of the notice, as to its having been given a reasonable time before trial.

Per Cur.—The party did not assign that or any other reason for his refusal; but merely said that he would not agree to admit them. We think the justice of the case requires that the plaintiff should have the costs.

(*c*) PRESUMPTIVE EVIDENCE, WHEN ADMISSIBLE, AND ITS EFFECT *.

* Where small rents had been paid without any variation for a long period to the lord:—Held, that it afforded no evidence of a title to the land, the presump-

(*d*) Hearsay* and reputation, evidence of, when admissible, and its effect.

Duke of Newcastle *v.* Broxtowe, M. T. 1832. K. B. 1 *N. & M.* 598; S. C. 4 *B. & Ad.* 273.

Orders of justices of sessions evidence of reputation as to a district parcel of a hundred†.

In an action against the hundred of Broxstowe, for the felonious demolition of Nottingham Castle, the question being, whether the castle was or was not locally situate within that hundred, certain orders of magistrates, made from the year 1654 to 1660, stating the castle to be so situate, were received in evidence.

The Court held them admissible, on the ground of reputation, the magistrates being persons supposed to be cognizant of the facts, as to this local description; and that local description not being, at that time, a matter in dispute.

(*e*) Parol evidence.

Taylor *v.* Cohen, M. T. 1826. C. P. 4 *Bing.* 53.

The expression in an agreement "to contribute in the usual way," may be ex-

The defendant, among other creditors, agreed to certain resolutions, to watch a commission supposed to be fraudulent, and "contribute in the usual way."

The Court held, that parol evidence might be resorted to to explain the meaning of that expression; viz. that each creditor should

tion being that they were quit-rents. (*Doe* d. *Whittick* v. *Johnson*, 1819, N. P., 1 Gow, 173). So, an ancient extent of Crown lands found in the proper office, and pursuing the directions of the stat. 4 Ed. 1, the Court would presume to have been taken under proper authority. (*Rowe* v. *Brenton*, M. T. 1828, K. B., 8 B. & C. 747).

In an action against a performer for non-fulfilment of a contract, it is to be presumed that the theatre is licensed. (*Rodwell* v. *Redge*, 1824, N. P., 1 C. & P. 220).

* It is a general rule of evidence, that hearsay is inadmissible, since it is the mere reception of evidence not given under the sanction of an oath, and without the test of truth, which is afforded by a cross-examination in open court. The excluding of hearsay evidence in questions of pedigree, prescription, or custom, would prevent all testimony whatever, for the evidence of any living witness of what passed within the short time of his own memory would often be insufficient in the former instance, although sufficient in the latter, and there is no other way of knowing the evidence of deceased persons than by the relation of others of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who from their situation were likely to know the facts; and also the general reputation of the place, or family most interested to preserve in memory the circumstances attending it. Any thing which shews such reputation is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases.

† Reputation being admissible evidence to establish a public right is equally admissible to shew that they have not that right. Upon a question, therefore, whether land on a river was a public landing place or not, reputation that it was the private landing place of the defendant and his predecessor, held inadmissible. (*Drinkwater* v. *Porter*, 1835, N. P., 7 C. & P. 181).

So, where the baptismal entry in the registry stated the child to be the "illegitimate son" of the mother:—Held, admissible, although the jury were to judge of its weight, and it could only be treated as evidence of the reputation of the parish. (*Cope* v. *Cope*, 1833, N. P., 1 M. & Rob. 269).

contribute in proportion to his claim against the bankrupt, and that they thereby did not become responsible for each other's contribution; they were therefore not joint contractors, and one having paid his contribution was a competent witness.

plained by parol evidence*.

SMITH *v.* WILSON, T. T. 1832. K. B. 3 *B. & Ad.* 729.

IN a lease it was provided, that, at the end of the term, the tenant should leave not less than 10,000 rabbits on the premises, to be taken and paid for by the landlord, at the rate of 60*l.* "per thousand." Evidence was offered on behalf of the defendant, to shew, that the term "thousand," when applied to rabbits in that part of the country, meant 100 dozen. The admissibility of the evidence was objected to, on the ground, that the term had a legal fixed acceptation, known to the law. The evidence was, however, admitted; and its effect in the result was, that the defendant obtained a verdict.

as, to shew that 1000 rabbits in a lease meant 100 dozen.

Lord *Tenterden*, C. J.—Upon the whole, I am of opinion, that this evidence was properly received.

REX *v.* WICKHAM, H. T. 1835. K. B. 2 *Ad. & E.* 517.

IN order to prove a settlement by estate in the parish of B., the respondents put in a deed of feoffment which conveyed an estate, set out in the deed by abuttals, but which was described as being in the parish of S. Upon appeal against an order of removal—

A misdescription in a deed as to the parochiality of lands, may be explained by parol†.

The Court held, that the respondents might bring forward parol evidence to shew, that the lands described in the deed, and of which livery was given, were situate in the parish of B., and not of S., as therein described.

(*f*) ADMISSIONS.

1. *General Rule.*

MIDDLETON *v.* MELTON, M. T. 1829. K. B. 10 *B. & C.* 317.

IN an action against the surety of a tax-collector, evidence was produced of entries made by a deceased person in a book kept by

Entries of receipts by a de-

* There are no degrees in secondary evidence:—Held, therefore, that upon non-production of a letter, after notice, the contents might be proved by parol. (*Brown* v. *Woodman*, H. T., 1834, 6 C. & P. 206).

† Where an entry made by a clerk since deceased is ambiguous, a person conversant with the mode in the office in which the business was conducted, may be called to explain a particular item. (*Hood* v. *Reeve*, 3 C. & P. 532). But, where negotiations, at first merely parol, are afterwards reduced into writing, the Court must look to the writing as shewing the final agreement, and will not afterwards allow questions to be put to ascertain whether other matters were not previously mentioned, besides those which were eventually reduced into writing. (*Sinclair* v. *Stevenson*, 1824, N. P., 1 C. & P. 582). However, where the defendant, in order to prove an agreement with the plaintiff and other creditors for a composition, put in a letter containing the terms of such agreement:—Held, that evidence of a previous covenant and inquiry by the plaintiff as to the probability of the other creditors concurring, was admissible to shew the motive and intention of writing the letter and entering into the agreement. (*Reay* v. *Richardson*, T. T. 1835, Ex., 2 C., M. & R. 422). But, where the defendant's attornies had given a written undertaking on his being discharged out of custody, the Court refused to allow the terms to be varied by parol evidence unless fraud shewn. (*Hill* v. *Warner*, H. T. 1833, Ex., 1 Dowl. P. C. 680).

ceased collector of taxes evidence against a surety, although the parties making the payment are alive*.

him for his own convenience only, wherein he appeared to charge himself with the receipt of money, which it was his duty to receive and pay over.

Held—first, to be evidence in an action against one who was his surety for paying over, that the money had been so received by the deceased; secondly, that one who had paid taxes to the collector was not a competent witness to prove such payment; on the ground, that he would be liable to contribute to a re-assessment in case of there being an ultimate deficiency.

See 2 *Stra.* 1129; 3 *B. & B.* 132; 10 *East,* 109; 4 *T. R.* 514; 8 *B. & C.* 556.

SINGLETON *v.* BARRETT, E. T. 1832. Ex. 2 *C. & J.* 368; S. C. 2 *Tyrw.* 409.

Although there be a written receipt on an account inadmissible for want of stamp, it will not exclude parol admissions of the debt.

THE plaintiff attempted to give in evidence an entry in a book signed by the defendant, whereby the defendant acknowledged himself to be indebted to the testator in the sum of 11*l.*, and undertook to pay the same by monthly instalments of 1*l.* On an objection taken by the defendant's counsel that this memorandum required a promissory-note stamp, *Parke,* J., rejected the evidence, but questioned the witness who produced the book. The witness deposed to a conversation between the defendant and the testator immediately before the memorandum was written, in which the defendant admitted he owed the testator the sum of 11*l.* for rent, and agreed to pay him that sum in the eleven following months. On this evidence the plaintiff obtained a verdict.

Lord *Lyndhurst,* C. B.—I have no doubt that what the defendant said in conversation before the memorandum was written and signed was properly received in evidence as an admission of the sum due. Payment may be proved by parol, although a receipt is given; and although a promise to pay a debt be reduced into writing, what the party says, admitting the debt, is still evidence.

NEWHALL *v.* HOLT, T. T. 1840. Ex. 6 *M. & W.* 663.—S. P. SLATTERY *v.* POOLEY, M. T. 1840. Ex. 6 *M. & W.* 664.

An acknowledgment is admissible in evidence, though it refers to a document not produced.

IN an action for goods sold, general evidence was given of the sale and delivery of a quantity of lead; and the plaintiff's attorney was then called, who detailed a conversation he had had with the defendant, in which the latter had admitted that he was indebted to the plaintiff in 9*l.* 17*s.* 6*d.*, for lead which he had purchased of him; but, on cross-examination, the witness admitted the existence

* But, in an action by the lord for copyhold fines, the book kept by the steward of all fines assessed, whether paid or not, held properly rejected as evidence of what fines had been paid, although it was accessible to all the copyholders, and had been received by the steward from his predecessor. (*Ely, Dean of, &c.* v. *Caldecott,* 7 Bing. 433; S. C. 5 M. & P. 272). A paper written by the plaintiff, although signed by a third person, is evidence against him. (*Alexander* v. *Brown,* 1824, N. P., 1 C. & P. 288). Where, in trover by the assignees of a bankrupt, amongst other admissions, one was by the defendant's attorney, that a commission had issued against the party, under which he was duly declared bankrupt, and the plaintiffs chosen assignees:—Held, that such admission dispensed with the necessity of producing the proceedings, and, no notice having been given to dispute any of the proceedings under the commission, was conclusive upon the face of it. (*Perring* v. *Tucker,* C. P., 3 M. & P. 557).

of a written agreement between the parties relative to the transaction.

Per Cur.—Independently of the admission being evidence of the amount under the account stated, we think whatever falls from a defendant may be evidence against him.

SHARPE *v.* LAMB, E. T. 1840. Q. B. 11 *Ad. & E.* 805; S. C. 3 *P. & D.* 454.

UNDER a Judge's order, the defendant called upon the plaintiff to admit that a copy of a letter, said to be written by him to a co-defendant, who had suffered judgment by default, was a true copy, which admission he made. There was no evidence, beyond this admission, that any such letter had been ever sent by the plaintiff, or was in existence. A notice to produce this letter had been served upon the plaintiff:—Held, under these circumstances, the original letter not being produced, that the defendant was not at liberty to read a copy as evidence.

An admission of copies at chambers does not sanction their being read, unless the original were evidence.

---

2. *Of Rule, H. T.* 4 *Will.* 4.

REG. GEN., H. T. 1833. K. B., C. P., and Ex.

IT is ordered, "That either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a Judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause: provided that, if the Judge shall think the application unreasonable, he shall indorse the summons accordingly: provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the Judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it. A Judge may make

Rule, H. T. 4 Will. 4, regulates the admission of written documents.

such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause."

---

3. *By Deed or Record.*

DOE *v.* COULTHRED, T. T. 1837. Q. B. 2 *N. & P.* 165.

A recital in a deed, that the party was in possession by the permission of A. is an admission that he is not the legal owner.

IN ejectment—

The Court held, that, where a party executed a deed, (for raising money on an annuity), reciting a will, and that the trustees had not sold, and that he was in possession by their permission, such admission was evidence to shew that he was not the legal owner of the estate.

STRACY *v.* BLAKE, H. T. 1836. Ex. 1 *M. & W.* 168.

An admission on record on any issue is only admissible as evidence on that issue.

ON a question arising as to an admission in legal proceedings—

The Court held, that an admission on record on any issue is only admissible as evidence on that issue, and not to prove or disprove another plea; but where a fact is admitted by the parties in the whole course of the cause, the jury may apply it to all the issues, although on the record admitted as to one only.

But see Bingham v. *Stanley*, 1 *G. & D.* 237; *Bourge* v. *Stuart*, *T. T.* 1842, *C. P.*

---

4. *In Pleadings*.*

5. *In Notice to produce†.*

---

6. *Where not confirmed at the Trial.*

TRUSLOVE *v.* BURTON, H. T. 1824. C. P. 9 *Moore*, 64.

An attorney's agent agreed to

AT the trial of this cause, the plaintiff was nonsuited for the want of proving the handwriting of a party to a particular instrument,

* Statements in a special plea cannot be used as evidence under the several issues; the plaintiff must prove his case upon the general issue before he can require damages on the special plea. (*Montgomery* v. *Richardson*, T. T. 1832, N. P., 5 C. & P. 247; S. P. *Firmin* v. *Crucifix*, T. T. 1831, N. P., 5 C. & P. 98; S. P. 5 Taunt. 228). But to debt on bond, plea of usury, the plaintiff offered a judgment in an action brought by the defendant against him for penalties, and held admissible. (*Cleve* v. *Powell*, M. T. 1832, N. P., 1 M. & Rob. 228).

† Where the note on which the action was brought was misdescribed as to its date in the notice to admit the handwriting, but the defendant could not be misled, the verdict having been found for the plaintiff, the Court refused to set it aside. (*Field* v. *Flemming*, H. T., 1837, Ex., 5 D. P. C. 450).

A promissory note was correctly stated in the declaration, and in the notice to admit, it was also correctly described, except that the time of payment was stated to be on the 10th of November. The note was produced before the Judge, and the defendant's attorney then refused to admit it, but afterwards consented to an order, in which he undertook "to make the admissions specified in the notice:"—Held, that this admission was sufficient, notwithstanding the mistake of October for November. (*Field* v. *Hemming*, M. T. 1836, N. P., 7 C. & P. 619).

which the defendant's attorney's agent had previously agreed should be admitted, but which he refused to comply with at the trial. An application was made to the Court, calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial had; which the Court, under the circumstances, directed to be done, and a rule was drawn up accordingly.

admit; but at the trial the admission was not confirmed—the Court granted a new trial*.

---

7. *In Criminal Cases*†. See ante, tit. *Confession;* and post, tit. *Indictment.*

8. *By Particular Persons.*

1.—*By Agent*‡.

2.—*By Assignees*§.

3.—*By Cestui que Trust*‖.

4.—*By Joint Wrong-doer*¶.

5.—*By Party to the Record***.

6.—*By Party not to the Record.*

ATTORNEY-GENERAL *v.* DAVISON, H. T. 1825. Ex. 1 *M'Clell. & Y.* 160.

BY an act of Parliament, commissioners were appointed to investigate certain public accounts; and they were directed to take a

Depositions made by third

* And in a similar case, with costs, to be paid by the defendant; but they refused to make the defendant's attorney pay the costs, because he was not present at the trial, when the objection was taken, and had given no instructions to the counsel to do so. (*Doe* d. *Tindal* v. *Roe*, H. T. 1836, B. C., 5 D. P. C. 420).

† Where a prosecutor gives in evidence the statement of the prisoner, which is exculpatory, it is not therefore to be taken as true; but it is for the jury to say if they think it consistent with the other evidence. (*Rex* v. *Steptoe*, 1830, N. P., 4 C. & P. 397).

‡ Where the defendant's son was alleged to have warranted a horse, as agent to the defendant, and to prove the authority evidence was offered of the son's declaration to a stranger:—Held inadmissible, as not made in the course of any bargain and sale for the horse. (*Allen* v. *Denstone*, 1839, N. P., 8 C. & P. 760).

§ The declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him. (*Fenwick* v. *Thornton*, H. T. 1827, N. P., 1 M. & M. 51).

‖ It is questionable whether, in an action brought by a trustee in respect of trust property, the admission of a cestui que trust, whose interest is not commensurate with his, can be evidence against him. (*Doe* v. *Wainwright*, T. T. 1838, K. B., 3 N. & P. 598).

¶ The declaration of a joint wrong-doer, who had suffered judgment by default:—Held, only admissible against the others in cases where there is a common object to be furthered. (*Daniels* v. *Potter*, H. T. 1830, N. P., 4 C. & P. 262).

** Declarations by a party to the record, although suing in a representative capacity, and made before he became such:—Held admissible. (*Smith* v. *Morgan*, 1836, 2 M. & Rob. 257).

parties, in a proceeding in which the defendant was concerned, are not evidence against him in an action at law.

prescribed oath, and were authorized to summon witnesses, and to examine them on oath; and persons giving false testimony were subjected to the penalties for perjury. The commissioners examined witnesses, and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected by the proceedings, but who had no opportunity of being present, or of cross-examining the witnesses. On a subsequent reference to arbitration of these accounts, the Court held, that the arbitrators could not receive as evidence the depositions taken before the commissioners; and—

The Court said, that in order to render depositions taken under any judicial proceedings evidence against a party, he must have had an opportunity to be present at the examination, and to cross-examine the witnesses.

7.—*By Stewards**.

8.—*By a deceased Party.*

CREASE *v.* BARRETT, H. T. 1835. Ex. 1 *C., M. & R.* 919.

Entries by a deceased party, charging himself, are evidence†.

IN this case the Court held that the whole entry, made by a deceased clerk, wherein he charges himself with a receipt of property for which he is accountable, may be read, though he states facts in the entry of which he has no actual knowledge.

(*g*) BEFORE JUSTICES OF THE PEACE‡.

LEACH *v.* SIMPSON, H. T. 1839. Ex. 7 *D. P. C.* 513.

The depositions taken before

IN trespass, a witness proved an affray against the plaintiff, brought before a magistrate for a riot. The plaintiff's counsel proposed to ask

* Where the entry of a deceased steward shewed the balance in his own favour:—Held, that it did not affect the admissibility of a particular entry charging himself. (*Williams* v. *Greave*, 1838, N. P., 8 C. & P. 592).

† Entries in a deceased agent's account, charging him with receipts, are evidence, if signed by him, though not in his handwriting. (*Doe* v. *Stacey*, 1833, N. P., 6 C. & P. 139).

‡ What is said by a magistrate on an investigation before him, in the presence of a plaintiff and defendant:—Held inadmissible, unless it drew forth some answer from the party against whom it is to be used; (*Child* v. *Grace*, M. T. 1825, N. P., 2 C. & P. 193); but where depositions of a deceased witness before the magistrate were duly taken and signed by the magistrate, but the cross-examination of the witness was taken subsequently:—Held, that the want of signature thereto, excluding the letter, would exclude the depositions altogether. (*Rex* v. *Francis*, 1836, N. P., 2 M. & Rob. 207).

It is to be presumed that what is stated on oath before a magistrate is taken down in writing; and therefore parol evidence of such a statement is not receivable, unless it be first shewn that it was not so taken. (*Phillips* v. *Wimburn*, H. T. 1830, N. P., 4 C. & P. 273).

A prisoner, before the magistrate, made a statement, which, by mistake, was written in the information-book, and headed, "The information and complaint of A. B.":—Held, that it was not receivable, although the mistake could have been explained by the magistrate's clerk. (*Rex* v. *Bentley*, 1833, N. P., 6 C. & P. 148).

some questions as to what had then been said before the magistrate, but, it appearing that the statement had been taken down in writing, it was contended, on the part of the defendant, that the depositions ought to be put in. The learned Judge was of that opinion, and rejected the evidence, and a verdict was found for the defendant.

magistrates are the best and only proper evidence of statements made.

Parke, B.—The rules of evidence must be the same in civil and criminal cases. Until the contrary is shewn, it is presumed that the magistrate took down all that was material in the testimony; that deposition, therefore, is the best evidence of what was said, and ought to be produced before the witness is questioned as to what passed on that occasion.

(*h*) Relative to instruments and proceedings partly public and partly private.

1. *Ancient Documents.*

Williams *v.* Wilcox, T. T. 1838. K. B. 8 *Ad. & E.* 314.

Where original is not produced and copy offered in evidence, the non-production of proof of search having been made should be specifically objected to, or the Court will not grant a new trial*.

Trespass for pulling down a wear. Plea, that it was wrongfully erected on a part of a navigable river, and impeded the navigation, wherefore the defendant removed it. Replication, that the part was distinct from the channel of the river, and that the part where the wear stood was not a navigable river. Rejoinder, that it was a part of the river navigable when the channel of the river was choked; which was alleged to have been choked up at the time when &c. In the surrejoinder, the plaintiff traversed his right. At the trial, a copy of an ancient grant was tendered in evidence. On an objection to the admissibility of a copy of the ancient grant, on the ground of no search having been made for the original, the objection was not particularly called to the attention of the Judge at the trial, and being one of many documents tending to prove a right which was unquestionable, and the admission could not have varied the verdict—

The Court refused, on motion for a new trial, to allow the objection to prevail.

---

2. *Answer in Chancery, &c.*

Ewer *v.* Ambrose, E. T. 1825. K. B. 4 *B. & C.* 25.

An examined copy of an answer in Chancery may be read to contradict a witness†.

In assumpsit, on a plea of non-joinder, a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery.

The Court held, that an examined copy of that answer was admissible to contradict him, and that it was not necessary to produce the original answer.

* Where, on a former trial of the same cause, the defendant had consented to admit in evidence a will fifty years old in the custody of B., a party who appeared to be his mortgagee, and on the trial afterwards the plaintiff's attorney, producing the will, admitted that he had received it from B.:—Held sufficient primâ facie evidence of proper custody to render it admissible. (*Doe v. Owen*, 1839, N. P., 8 C. & P. 751).

† But office copies are inadmissible for that purpose. (*Barnard* v. *Nerot*, M. T. 1824, N. P., 1 C. & P. 578). And, in an action against an annuity

LONG *v.* CHAMPION, E. T. 1831. K. B. 2 *B. & Ad.* 285.

A copy of a letter agreed to be evidence, as if deposited at the Master's office in Chancery, having reference to a Chancery suit, is admissible without producing the proceedings in Chancery.

A BOOK, containing the copy of a letter, had by consent of the parties to a Chancery suit, been inspected at the office of the attorney of the party who had the possession of it, instead of being deposited with the Master, and on that occasion a copy of the entry in the book was taken by the party who inspected. On a trial at law between parties in the same interest—

The Court held, that, upon notice to produce this book, evidence of the copy so taken was admissible, without reading the answers in the suit in which it was produced, and which answer referred to it, and was the cause of its inspection.

---

3. *Bishop's Register**.

4. *Exemplifications*†.

broker for laying out money on insufficient securities, in order to shew the defendant's admission of the insolvency of a surety, in an answer to a bill filed by different parties, of which an examined copy had been put in:—Held, that a witness who had examined the original might prove that it was signed by the defendant to establish the identity of the defendant. (*Dartnall* v. *Howard*, 1 R. & M. 169; see 16 East, 334, 1 B. & A. 182). But, where A. brought an action against the sheriff for a false return of nulla bona to a fi. fa. issued against the goods of B., B. had filed a bill of discovery against A., on which there had been a decree or order that A. should bring into the Court of Chancery all letters written by B., or any other person, to him respecting the original debt. A. under this decree or order brought in various letters:—Held, that none of them could be read in evidence on the part of the defendant in the present action without first putting in the bill and answer. (*Hewett* v. *Piggott*, T. T. 1831, N. P., 5 C. & P. 75). An answer in Chancery, made after a party had conveyed away his interest in the subject-matter of the suit, is inadmissible in an action by or against the parties. (*Gully* v. *Bishop of Exeter*, H. T. 1828, C. P., 5 Bing. 171; S. C. 2 M. & P. 266; abridged, ante, tits. *Advowson—Annuity*).

A demurrer or plea to a bill in equity does not admit the facts charged on it, as to be evidence against the defendant of those facts in a future action between the same parties. (*Tomkins* v. *Achley*, 1 M. & M. 32).

* The bishop's register is admissible in evidence. (*Arnold* v. *Bishop of Bath and Wells*, 5 Bing. 316). If the vicar of a parish be applied to for an extract of the parish register of a particular date, and he state that there is no register book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register without calling the vicar; but, if the vicar had produced to the applicant a book as the original register, the Judge at the trial would have held it to have been so, unless the contrary was shewn. *Semble*, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence instead of the original register, or an examined copy of it without proof of the loss of the original register; but *semble*, that if the original be proved to have been lost, examined copies of these returns would be admissible. But, if the returns were made under the stat. 52 Geo. 3, c. 14, ss. 6 & 7, *semble*, that examined copies of them would be evidence, without proof of the loss of the original register. If an original parish register be produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. (*Walker* v. *Beauchamp*, 1834, N. P., 6 C. & P. 552).

† Where a document purporting to be an exemplification of a commission temp. Eliz., was produced from the proper custody, but the seal was gone from the usual slip of parchment annexed, the Court held, that it would presume it a complete exemplification. (*Beverley* v. *Craven*, 2 M. & Rob. 140).

5. *Fleet Register**.

6. *Interrogatories*†.

7. *House of Lords, Journals in*‡.

8. *Proceedings in a former Cause*§.

9. *Records.* See ante, p. 634.

---

10. *Remembrancer's Office.*

ROGERS *v.* WOOD, E. T. 1831. K. B. 2 *B. & Ad.* 245.

A document from the Remembrancer's office, amounting to a decision by members of the Court, including the Solicitor-General, is not evidence as a public document.

UPON the trial of a quo warranto information as to an alleged usurpation of jurisdiction of a county palatine, a document was produced from the Remembrancer's office in the Exchequer, purporting to be a decision by parties, some of whom were members of the Court, and others not, joined with the Attorney and Solicitor-General, acting judicially:—Held, that it could not be received as the judicial proceedings of any Court known to the law, nor as an award, one of the parties not being voluntary parties; nor could it be evidence of reputation, the parties having no personal knowledge of the facts, except what was derived in the course of proceedings.

---

11. *Rules of Court*‖.

DANCE *v.* ROBSON, H. T. 1829. 1 *M. & M.* 294.

The printed rules of Court are evidence.

THE Court had issued amongst their officers printed rules and orders of the Court for their guidance:—Held, that one of the printed copies was admissible to shew the duties of those officers, although the original rule was kept under the seal of the Court, and there was no proof of the copy having been examined with the original.

* A Fleet register of marriages is not evidence for any purpose. (*Doe* v. *Galard*, 1835, N. P., 6 C. & P. 578).

† Where the interrogatories to certain servants at assession-courts, upon proper search, could not be found:—Held, that the answers might be read, subject to any obscurity which might arise from want of the questions destroying their effect. (*Rowe* v. *Brenton*, M. T. 1828, K. B., 8 B. & C. 765).

‡ An entry in the journals of the House of Lords, reciting the limitations in a patent of peerage, admitted by the committee of privileges, without producing the patent itself. (*Lord Dufferin's case*, 4 C. & J. 568).

§ Neither the issue delivered, nor the Nisi Prius record, in an action between the same parties, are admissible, as proof of the facts stated in the pleadings, where no judgment has been had; *semble*, *aliter*, if it has been signed. (*Holt* v. *Miers*, M. T. 1839, N. P., 9 C. & P. 191). But where admissions were made previous to the former trial:—Held, that they were receivable on a new trial, notwithstanding a notice by the opposite party that no admissions would be made. (*Doe* d. *Wetherall* v. *Bird*, H. T. 1835, N. P., 7 C. & P. 6). So, evidence at Nisi Prius, that the action had originally been brought in the Palace Court, and that the defendant let judgment go by default, and removed the cause by habeas corpus:—Held admissible. (*Tidmos* v. *Lees*, H. T. 1832, N. P., 5 C. & P. 233).

‖ When a rule of the Court is given in evidence, Court can only look to rule itself, and not to what passed when it was granted. (*Edwards* v. *Cooper*, H. T. 1828, 3 C. & P. 277).

12. *Sheriff's Office, Documents from*.*

CHAMBERS *v.* BERNASCONI, E. T. 1831. Ex. 1 *C. & J.* 451; S. C. 1 *Tyrw.* 535.

A memorandum filed in the sheriff's office, at the request of a deceased officer, of an arrest, is not evidence.

A SHERIFF'S officer sent a written memorandum to the sheriff's office, stating that he had arrested A. B. at a certain place; this return was filed at the sheriff's office, and, the officer being dead, was received in evidence to prove the place of such arrest, in an action between A. B. and a third party—

The Court granted a new trial, intimating a strong opinion, that such return was not evidence of the place of arrest, but giving the party an opportunity of putting the question upon the record.

---

13. *Tablets in Churches, &c.†.*

14. *Topographical History‡.*

15. *Writs§.*

(*i*) RELATIVE TO PRIVATE DOCUMENTS, LETTERS, &c.‖.

WRIGHT *v.* DOE *d.* TATHAM, H. T. 1834. K. B. 3 *N. & M.* 268; S. C. 1 *Ad. & E.* 3.

It is not settled whether letters

IN an action of ejectment the question was, whether the testator, from the time of his attaining a competent age, down to the time of the execution of his will, was of sound mind. Letters found amongst

* Where, in trover against the sheriff by assignees, it appeared that the warrant to the officer was lost:—Held, that parol evidence of its contents to connect the officer with the sheriff, was admissible, without calling for the entry in the book at the sheriff's office. (*Moon* v. *Raphael*, 1837, N. P., 7 C. & P. 115).

† Without an examined copy, the contents of a tablet in a church may be proved by a witness who has read it. (*Doe* d. *Coyles* v. *Cole*, 1834, 6 C. & P. 360).

‡ Upon a question as to the boundaries of a manor coterminous with those of the county, a topographical county history held inadmissible. (*Evans* v. *Getting*, 1834, N. P., 6 C. & P. 586).

§ Vendee, under an execution, may, in an action against the sheriff, prove the writ without giving evidence of the judgment. (*Doe* d. *Batten* v. *Murless*, 1819, K. B., 6 M. & S. 110).

‖ Where letters are put in, bearing different dates:—Held, that other parts of the same correspondence, sent in the interval, could not be received, unless expressly referred to in those which are put in. (*Sturge* v. *Buchanan*, 1836, N. P., 2 M. & Rob. 90). So, a letter written by a party can only be made evidence for him in his own cause as a notice or demand. (*Richards* v. *Frankum*, 1840, 9 C. & P. 221).

Where the plaintiff's agent wrote to a witness (living abroad and examined by commission), the draft of which was shewn to and approved by his attorney:—Held, that the draft was admissible without producing the original, as evidence of an act done; but that the answer of the witness to the agent was not admissible. (*Rawlins* v. *Desborough*, M. T., 1837, N. P., 8 C. & P. 321).

Where the practice of the defendant's counting-house was, that the clerk, after

his papers shortly after his decease, and written to him at various periods of his life, by persons shewn to have been intimately acquainted with him—

The Court held, to be admissible in evidence, to shew the manner in which he was treated by such persons.

written to a person since deceased, found among his papers, are evidence upon an issue as to his sanity.

GLEDDOW *v.* ATKIN, H. T. 1833. Ex. 1 *C. & M.* 410; S. C. 2 *Tyrw.* 593.

IN an action by the executors of the obligee against the executors of the obligor, on a bond more than twenty years old, an indorsement by the obligee, that the money secured was trust-money, which appeared to have been made contemporaneously with the execution of the bond, but was not proved to have been seen by the obligor—

The Court held that an indorsement by the obligee of a bond, either contemporaneously with the execution of the bond or before the presumption of satisfaction arises, of a fact peculiarly (such as payment of interest) within his own knowledge, against his own interest, and which he has no interest to misrepresent, is admissible in evidence for himself or his representatives, in an action on the bond.

Indorsements of the payment of interest by the obligee are evidence of the non-payment of the principal*.

(*j*) RELATIVE TO DEPOSITIONS.

DAVIS *v.* NICHOLSON, T. T. 1830. C. P. 7 *Bing.* 558; S. C. 5 *M. & P.* 185.

THE defendant in this cause having obtained a mandamus for the examination of witnesses in India, under the stat. 13 Geo. 3, c. 63,

Where depositions are taken

copying a letter into the letter-book, returned it to the defendant to seal, and that he or the other clerk carried all letters to the post-office; but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all the letters given them to carry:—Held, that the entry in the clerk's writing in the letter-book, of a letter to the plaintiff, could not be read as proof of such letter having been sent to the plaintiff. (*Toosey* v. *Williams*, M. T. 1827, N. P., 1 M. & M. 129).

A defendant, who puts in evidence a correspondence, consisting of several letters between himself and the plaintiff, has a right to give in evidence a letter written by him to the plaintiff in reply to the plaintiff's last letter, which bore date on the day before the defendant's letter. (*Roe* v. *Day*, M. T. 1836, N. P., 7 C. & P. 705).

The fact of a letter having been sent to a woman some years before her death is not sufficient to raise a presumption that such letter is in the custody of her executrix then, or five years after, as the testatrix might have destroyed it in her lifetime. (*Drew* v. *Durnborough*, M. T. 1825, N. P., 2 C. & P. 198).

* In ejectment for a cottage, alleged to be a parish house, and into which paupers had been placed by the parish officers, which the lord of the manor alleged he had done jointly with them, but which failed in proof; and it appeared that the lord had induced the pauper in possession, and he had put the defendant in:—Held, that a private entry of a deceased builder of repairs done, and paid by the lord, was inadmissible; held also, that the lord having come in under a person occupying by the parish, was estopped from disputing their title. (*Doe* d. *Haden* v. *Burton*, 1840, 9 C. & P. 254).

Upon books of entries being called for and produced, and an entry read, although the party against whom it is read is entitled to have the whole of the particular entry read, he cannot insist upon reading distinct entries in other parts of the book. (*Cats* v. *Howard*, 1819, N. P., 3 Stark. 6).

under 13 Geo. 3, c. 63, s. 44, the adverse party is entitled to take copies at his own expense.

ss. 40, 44, the plaintiff, who had taken no part in obtaining the writ, applied to the secondary to be furnished (at his own expense) with copies of the depositions returned thereon.

The Court held, that where a mandamus for the examination of witnesses in India is obtained on the application of one party, and the other takes no part therein, the latter is nevertheless entitled to copies of the depositions, at his own costs.

(*k*) Relative to impounding*.

(*l*) Relative to new trials†.

(*m*) Relative to the course of proof‡.

Davies *v.* Morgan, T. T. 1831. Ex. 1 *C. & J.* 587; S. C. 1 *Tyrw.* 457.

Circumstances necessary to make a document evidence must be proved aliunde, and not from the document itself.

The master of a company, under a bye-law, issued to the wardens their warrant to distrain for a penalty. This warrant was put in as evidence by the plaintiff, (the party distrained upon), in an action for the seizure, to establish his case against the masters as co-defendants with the wardens. The warrant recited a demand of the penalty previous to the seizure.

The Court held, that such demand was not established by the putting in of the warrant by the plaintiff, but that the defendants ought to have proved it.

(*n*) Where written document is disclosed on examination§.

* To authorize the Judge to impound documents offered in evidence on the trial, the application must be made during the progress of the cause, and it is too late afterwards to do so. (*Borton* v. *Ockford*, 1836, 7 C. & P. 547).

† Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn held admissible, notwithstanding an order for reading the depositions in equity of such witnesses as had died since the first trial. (*Tod* v. *Earl of Winchelsea*, 1828, 3 C. & P. 387).

‡ In ejectment by an heir, the plaintiff having proved a title as heir, upon which the defendant set up title under a will:—Held, that the plaintiff was entitled to put in reply a subsequent will revoking the former devise, as in contradiction of the defendant's case, and not as part of his own case in chief. (*Doe* v. *Goslee*, M. T., 1839, 2 M. & Rob. 243; S. C. 9 C. & P. 46).

When a question as to what the lord parted with to what were called conventionary tenants, it appearing that a number of manors formed one tenement under the same lord:—Held, that evidence of rights exercised by the lord's own conventionary tenants in one of the manors might be received, to shew what rights he had reserved throughout the district. (*Rowe* v. *Brenton*, M. T. 1828, K. B., 8 B. & C. 762).

§ Where, by the cross-examination of the plaintiff's witness, who had proved a primâ facie case of the sale of goods, it appeared that the plaintiff had said that the goods were sold under a written contract, which he produced to the witness:—Held, that the written contract spoken of was evidence for the plaintiff without calling the broker, by whom it purported to have been made and signed. (*Smith* v. *Blandy*, E. T. 1825, N. P., 1 R. & Moo. 257).

(*o*) Relative to identity.

Corfield *v.* Parsons, T. T. 1833. Ex. 1 *C. & M.* 730; S. C. 3 *Tyrw.* 806.

Evidence of identity is entirely a question for the Judge at the trial.

The defence was, that the defendant had received the note to discount from the first indorsee, who had referred him to the plaintiff for information of his solvency, and that the plaintiff had falsely represented that he was solvent. To prove this a witness was called, who stated, that he went to Corfield's house, and there on inquiring for Corfield, a person presented himself, who asked, "what is your business?" He was dressed in a morning gown. Corfield was in the habit of dressing in a morning gown; but it appeared that Corfield's brother, and a clerk who lived in the house, were also in the habit of wearing morning gowns. The Judge held the evidence of identity insufficient to let in the conversation with the person so dressed, and the plaintiff recovered a verdict.

The Court held, that the Judge will decide whether particular evidence which is tendered, is admissible to prove identity for the purpose of letting in evidence of a conversation. The jury will determine on the weight of the evidence when admitted.

(*p*) Relative to the death of a party*.

(*q*) Relative to foreign proceedings.

Appleton *v.* Braybrook, H. T. 1817. K. B. 6 *M. & S.* 34.

Copies of proceedings in foreign courts not evidence unless actual exemplification under seal or examined by a witness who is called†.

In an action on judgments recovered in the Supreme Court of Jamaica, the plaintiff only produced paper writings, purporting to be copies of the judgments, subscribed "true copy," and signed "F. S., Clerk." To which were annexed several certificates; first, of F. S., under his hand and seal of office, certifying, that the above were true copies of the original judgments of records in his office, and that the same were still unsatisfied; second, a certificate of R. R., described as secretary and notary public, certifying that F. S. was clerk, &c.; and that to all acts &c., signed by him, credit &c.; the third, from the governor-general, under the seal of the island, certifying that R. R. was secretary, &c., and that to all acts &c., signed by him, credit was to be given.

* To prove that W. F. of L. was dead, his will, dated in the year 1817, from the Prerogative Court was produced, and an examined copy of the register of burials of L. of the year 1817, containing an entry of the burial of a "W. F., of L.;" and it was stated by a niece of W. F. that he was dead, and that she had received a legacy of 100*l.* under his will, but was not at the place when he died: —Held, to be sufficient evidence of the death of W. F. (*Doe* d. *Graham* v. *Penfold*, 1838, N. P., 8 C. & P. 536).

† An examined copy of a charter deposited in the proper public office at Madrid, held sufficient proof of the plaintiffs being a corporation according to the laws of Spain. (*National Bank St. Charles* v. *De Bernales*, 1835, 1 R. & M. 190; S. C. 1 C. & P. 569).

The Court held this to be insufficient, without proving the copies to have been actually examined; the seal of the island not being affixed to the copy to give it the force of an exemplification, but only to authenticate the person certifying to be a person to whom credit was to be given,

Exceptions, Bill of.

WILLANS *v.* TAYLOR, E. T. 1830. C. P. 6 *Bing.* 512.

A writ of error does not neutralise a bill of exceptions, though not signed.

THE defendant having sent to the plaintiff a draft of a bill of exceptions after a writ of error brought, the latter refused to return it, considering it waived by the writ of error. A Judge's order having been obtained by the defendant for its delivery within a certain period—

The Court refused to rescind that order.

VINES *v.* READING CORPORATION, M. T. 1826. Ex. 1 *Y. & J.* 4.

The whole evidence is to be taken together as set out, to enable the Court of error to form an opinion.

UPON an exception taken, in a bill of exceptions, in which the whole evidence was set out, that the evidence for the defendant was sufficient to entitle the defendant to a verdict, and to bar the plaintiff's claim—

The Court held, that a Court of error might look to the whole evidence on both sides, to see whether the verdict was sustained by the evidence.

See 4 *B. & C.* 538; 7 *D. & R.* 1.

ARMSTRONG *v.* LEWIS, M. T. 1834. Ex. Chamb. 2 *C. & M.* 274; S. C. 4 *M. & Scott*, 1.

Where the exceptions were placed in the bill after the finding of the jury, the Court refused to give judgment.

ERROR from the Court of Exchequer, on a bill of exceptions, taken to the directions of Lord *Lyndhurst*, C. B., on the trial of a feigned issue, directed by his Honor the Master of the Rolls. The exceptions, which were placed after the finding of the jury, now came on for argument.

Lord *Denman*, C. J.—The Court have considered this record, and the exceptions which have been taken, and it has occurred to several of the Judges that these exceptions are not properly taken, and that no judgment could be given for the plaintiff in error for that reason upon the record.

CULLEY *v.* ROE *d.* TAYLERSON, E. T. 1840. Q. B. 3 *P. & D.* 539; S. C. 11 *Ad. & E.* 1008.

A bill of exceptions may be amended by the Judge's notes, as where it appeared that

THE record, after setting forth the points made by the counsel at the trial, and the ruling of the learned Judge, proceeded thus:—"And, therefore, the said jury gave their verdict for the said plaintiff, with 1*s.* damages, whereupon the said counsel for the said defendant did then and there except to the opinion of the said Justice,

and insisted that," &c. It was objected, that the exceptions appeared by the record to have been made after the finding of the jury. The exceptions were, in fact, taken before the verdict was given.

the verdict was first given.

The Court held, that the record might be amended.

Exchange*.

CROSS *v.* BADLETT, M. T. 1829. C. P. 3 *M. & P.* 537.

IN assumpsit on an exchange of horses, it appeared that the plaintiff agreed with the defendant to give him a horse and 25*l.* for a mare of the defendant's. The money was paid, and a receipt given by the defendant, stating that "both (the horse and mare) were warranted sound." The mare proving unsound, the plaintiff sued the defendant on his warranty, and, in the declaration, he omitted to state the warranty on his part.

In declaring upon a contract of exchange, the whole consideration must be stated.

The Court held, that the plaintiff could not recover, as the whole of the consideration was not set forth. The plaintiff, in stating his contract, could not state a contract of exchange of horses without stating the money-consideration also, and he could not state the money-consideration without also stating the warranty, giving the defendant a right of action, if the plaintiff's horse proved unsound.

See Sheldon v. *Cox*, 3 *B. & C.* 420; *S. C.* 5 *D. & R.* 277.

Exchequer†, Clerks of Court of.

STOKES *v.* WHITE, T. T. 1834. Ex. 1 *C., M. & R.* 223; S. C. 4 *Tyrw.* 786.

CASE for causing the plaintiff to be arrested and imprisoned on an alias capias of privilege, notwithstanding the plaintiff's privilege

The privileges of the side-

* *Of Goods.*]—Assumpsit lies for the non-completion of a contract of exchange. (*Bach* v. *Owen*, M. T. 1793, K. B., 5 T. R. 409).

Of Estates.]—An exchange is a mutual grant of equal interest, (see Lit. s. 62), to constitute which five circumstances are necessary:—1st. That the estates given be equal; 2nd. That the word excambium be used, which cannot be supplied by any other expressions, or described by any circumlocution; 3rd. That there be an execution by entry, or claim in the life of the parties; 4th. That, if it be of things which lie in grant, it be by deed; and lastly, That, if the lands lie in several counties, it be by deed indented; or, if the things lie in grant, though they lie in one county. (Inst. 51 b).

Since the 29 Car. 2, every exchange must be by deed in writing, and where an exchange is made by lease and release, containing mutual conveyance to the parties, as is now the general practice, no entry is necessary, for the Statute of Uses executes the possession, and all incidents annexed to an exchange at common law will be preserved. (See 4 Cruise, Dig. 82). In every deed of exchange there is an implied warranty, arising from the word excambium. (4 Cruise, Dig. 82).

All persons who are capable of conveying their lands by any common assurance may, of course, exchange them with others. (See 1 Inst. 50 b).

† By 1 Will. 4, c. 70, "All persons admitted or admissible to practise as attornies in the K. B. and C. P., shall be admissible in like manner as attornies of

clerks as to suing still exist, notwithstanding the Uniformity of Process Act.

as a witness, and as an attorney of the Court of King's Bench. It was admitted that the plaintiff was indebted to the defendant in the sum of 74*l.* 3*s.* for business done in the character of the plaintiff's town agent. It was proved that the plaintiff was an attorney of the Court of King's Bench, and that the defendant was a clerk in court on the plea side of the Court of Exchequer; and that such clerks in court had always possessed and exercised the privilege of holding to bail attornies of the other Courts.

The Court held, that the office of side-clerk is not abolished by 1 Will. 4, c. 70, and 2 & 3 Will. 4, c. 110; but the side-clerks have still the right to sue and arrest by capias of privilege attornies of the other Courts.

Excise and Customs.

See 3 & 4 Will. 4, c. 58.

Wackerbath *v.* Rich, T. T. 1840. 9 *C. & P.* 699.

The words in the 3 & 4 Will. 4, c. 58, mean pure sugar, equal in quality with the standard samples*.

In trespass, it appeared that the defendant, a searcher at the customs, had seized double-refined sugar, entered by the plaintiff, for the bounty, under 3 & 4 Will. 4, c. 58.

The Court held, that the words in the sections 2 and 8 were to be taken "of one uniform whiteness," according to the subject-matter, not that every loaf was to be free "from all discolouration," but it would be a sufficient compliance with the intention of the legislature, viz. that it should be fine sugar if equal in quality with the standard samples.

Barry *v.* Arnaud, E. T. 1840. K. B. 2 *D. & P.* 633.

A collector of customs, under 3 & 4 Will. 4, c. 51, s. 2, is bound to sign a bill on entry or tender of the duty payable.

This was an action on the case against the collector of customs for the port of Liverpool for not accepting the sum of 144*l.* 12*s.* 8*d.*, tendered by the owner of certain tobacco, as the amount of duty due thereon, and for refusing to sign a bill of entry of such tobacco.

The Court held, that a collector of the customs, appointed under 3 & 4 Will. 4, c. 51, s. 2, and whose duty it was, upon receipt of the duties, to sign a bill of entry as a receipt, being a warrant for delivery of the goods, to be a ministerial and independent officer, and not a mere agent of the commissioners appointing him, and liable to an action for damages by improperly refusing to give such bill of entry or tender of the duties payable.

the Court of Exchequer, and be admitted and allowed to practise as such, upon application to the Barons of that Court, without being obliged to employ any clerk in court, in the capacity of attorney of the Court of Exchequer, any law or usage to the contrary notwithstanding."

Process of outlawry may now be had in the Court of Exchequer. (See 7th section of 2 Will. 4, c. 39; post, tit. *Outlawry*).

* The lien of the Crown (for duties) on the subject-matter in respect of which the duties are imposed, semble, is not defeated by an assignment to the provisional assignee, although process does not issue until after assignment; and such lien is several as to each subject-matter, and not on the whole, for the entire amount of duties. (*Rex* v. *Dale*, T. T. 1823, Ex., 13 Price, 739).

ATTORNEY-GENERAL *v.* SLEE, M. T. 1824. Ex. 1 *M'Clel.* 567.

BY the 57 Geo. 3, c. 123, s. 3, it is enacted, "That any maker or makers, distiller or distillers, rectifier or rectifiers of, or dealer or dealers in, or retailer or retailers of spirits in England, and every person or persons who shall in any manner use or employ, or cause or suffer to be used or employed, any permit, so as that any account kept or checked, or *to be* kept or checked by the officer or officers of excise by such permit, shall or may be frustrated or evaded, he, she, or they shall, for every such offence, severally forfeit and lose the sum of 500*l.*, over and above all other penalties, &c., whatsoever."

The stat. 57 Geo. 3, c. 123, s. 3, is not confined to the surveying officers on the spot, but is applicable to any officers of excise.

The Court held, that the provisions of the statute are not to be limited to the surveying officer resident on the spot, but are applicable to any officer of excise whose account may be frustrated and evaded by the fraudulent use of permits.

LEGGE *v.* BOYD, H. T. 1840. C. P. 8 *D. P. C.* 272; S. C. 6 *Bing. N. S.* 240.

THE plaintiff commenced an action against the defendant, collector of the port of London, and declared in trover; and an action was then depending in the Court of Queen's Bench, in which the same principle was involved, and in which doubt was entertained as to the proper mode of declaring, in consequence of which the plaintiff suspended his proceedings, until the decision of the case in the Court of Queen's Bench. In Trinity Term, 1839, that Court gave judgment, determining that that action was properly brought in tort for non-feasance, and not in trover. This Court, in Michaelmas Term, 1839, granted a rule nisi, on the application of the plaintiff, to amend his declaration, by substituting a count in tort for that in trover, which in the following term was made absolute.

Where a sufficient sum is tendered to a collector of customs, an action on the case for the non-feasance, or not delivering the goods, will lie, not trover.

ATTORNEY-GENERAL *v.* BARRELL, T. T. 1827. Ex. 1 *Y. & J.* 495.

ON an information under 11 Geo. 1, c. 30, s. 30, for fraudulently removing candles before being weighed by the surveying officers:— Held, 1st, that removing candles only one-eighth made *was* within the statute; but that the intent "to deceive his Majesty of, or in his duties," is an ingredient of each offence stated in the act, and should therefore be charged in the information; and 2ndly, that candles one-eighth made are within the meaning of the stat. 11 Geo. 1, c. 30, s. 30.

An information for removing candles one-eighth made is an offence within the 11 Geo. 1, c. 30.

ATTORNEY-GENERAL *v.* VONDIERE, M. T. 1834. Ex. 1 *C., M. & R.* 570; S. C. 5 *Tyrw.* 206.

BY 3 & 4 Will. 4, c. 52, "The importer of goods shall, within fourteen days after arrival of the ship, make perfect entry inwards of such goods, and land the same; and in default thereof, the officers of customs may convey the same to the King's warehouse; and if the duties due upon goods so conveyed shall not be paid within three months, they shall be sold for payment of the duties and charges."

Upon an information for removing goods out of any warehouse under 3 & 4 Will. 4, c. 52, not en-

tered, the King's warehouse is within the act*.

By c. 53, s. 28, "If goods which shall have been warehoused, or otherwise secured, for home consumption or exportation, shall be clandestinely or illegally removed from or out of any warehouse or place of security, they shall be forfeited." By s. 20, "Goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited."

The Court held that the King's warehouse at the Custom-house was included in the terms of the prohibition in the statute.

Execution.

I. IN CIVIL PROCEEDINGS.

(*a*) In general.

1. *With reference to the Persons by and against whom Execution may issue.*

1.—*In general*, p. 651.

2.—*In particular.* See tits.

Corporation,
Executors and Administrators,
Heir,
Hundredors,
Husband and Wife,
Insolvent Debtors,
Partners,
Prisoners.

3.—*Relative to a Change of Parties; as by*

Bankruptcy. See tit. *Bankrupt.*
Death. See tit. *Executors and Administrators.*
Marriage. See tit. *Husband and Wife.*

2. *With reference to the Cases in which Execution may issue*, p. 651.

3. *With reference to the Court by whom awarded*, p. 652.

4. *With reference to the Party being estopped from suing out*, p. 653.

5. *With reference to the Period limited for suing out*, p. 653.

6. *With reference to the Form of, and Mode of conducting*, p. 654.

7. *With reference to speedy Execution under* 1 *Will.* 4, *c.* 7, p. 655.

8. *With reference to concurrent Writs*, p. 657.

* And the same point was decided in *Attorney General* v. *Lowe*, (5 Tyrw., Ex. 211).

I. IN CIVIL PROCEEDINGS—(*continued*).

9. *With reference to successive Writs*, p. 658.

10. *With reference to setting aside*, p. 659.

(*b*) IN PARTICULAR.

1. *Of the Capias ad Satisfaciendum*, p. 659.

2. *Of the Habeas ad Ca. Sa.*, p. 660.

3. *Of the Fi. Fa.*

1.—*In what Cases a Fi. Fa. may issue*, p. 661.

2.—*As to the Things which may be taken in execution under a Fi. Fa.*, p. 661.

3.—*Relative to the Mode of conducting the Execution under*, p. 662.

4.—*As to the Landlord's right to Rent under a Fi. Fa.*, p. 663.

5.—*Relative to Pleading a Justification under a Fi. Fa.*, p. 664.

4. *Of the Elegit*, p. 664.

5. *Of the Levari Facias*, p. 666.

6. *Of the Venditioni Exponas*, p. 666.

7. *In inferior Courts*, p. 666.

II. IN CRIMINAL PROCEEDINGS, p. 667.

I. IN CIVIL PROCEEDINGS.

(*a*) IN GENERAL.

1. *With reference to the Persons by and against whom Execution may issue.*

1.—*In general**.

2. *With reference to the Cases in which Execution may issue.*

EVANS *v.* PUGH, H. T. 1834. Ex. 2 *D. P. C.* 360.

Extra costs agreed to be paid cannot be included in the execution, the

ON motion to set aside an execution, it appeared that the plaintiff agreed to take no proceedings against the principal, if the defendant, the surety, would pay the extra costs, which he consented to do.

* The party in whose favour judgment has been given, should sue out execution against his adversary, who has failed to recover. (See Gilb. Exec. 43; Bing. Exec. 118). Where a party has been improperly made a defendant in a cause, and the defence has been conducted in his name without his authority or knowledge, the Court will relieve him from execution when it appears from the circumstances of the attorney that he could have no remedy against him. (*Stanhope* v. *Eavery*, M. T. 1836, B. C., 5 D. P. C. 357; S. C. 4 Scott, 39).

remedy being on the agreement*.

The Court held, that those costs could not be included in the execution, but could only be sued for as on a collateral agreement.

HEWES *v.* PYKE, H. T. 1832. Ex. 2 *C. & J* 359; S. C. 2 *Tyrw.* 313.

After a deposit in lieu of bail execution can only issue for the excess due.

IN this case the defendant deposited in the sheriff's hands the sum indorsed on the writ, with 10*l.* for costs, in lieu of bail to the sheriff; and afterwards, that amount, together with the additional sum of 10*l.*, as a further security for the costs in the action, was paid into Court, pursuant to the stats. 43 Geo. 3, c. 46, and 7 & 8 Geo. 4, c. 71, s. 2. At the trial of the cause the plaintiff recovered a verdict.

The Court held, that the plaintiff could not issue execution for the whole sum recovered, but is bound to take the sum deposited out of Court, and to limit his execution to the surplus only.

BAYLEY *v.* POTTS, T. T. 1837. K. B. 3 *N. & P.* 365.

But a tender of the debt without costs is insufficient, and the plaintiff may issue execution.

THE plaintiff having obtained judgment for 23*l.*, and issued a fi. fa. for 24*l.*, including 1*l.*, the costs of the writ:—Held, that a tender of the debt, without the costs, was insufficient, and the plaintiff entitled to issue execution.

---

3. *With reference to the Court by whom awarded.*

DUCKWORTH *v.* FOGG, M. T. 1835. Ex. 2 *C., M. & R.* 736; S. C. 1 *T. & G.* 172; S. C. 4 *D. P. C.* 396.—S. P. LORD *v.* CROSS, M. T. 1834. K. B. 3 *D. P. C.* 4; S. C. 4 *N. & M.* 30; S. C. 2 *Ad. & E.* 81.

To obtain execution in Courts at Westminster on judgment in C. P. Lancaster, affidavit must shew that the party has removed his goods out of that jurisdiction†.

ON motion, on the 4 & 5 Will. 4, c. 62, s. 7, (the Lancaster Court of Common Pleas Act), for leave to issue a writ of execution on a judgment recovered in that Court against a person who had removed out of the jurisdiction. A certificate was produced from the prothonotary of the Court of the signing of the final judgment; but—

Per Cur.—There must be an affidavit of the party having removed his person or goods and chattels.—Rule refused.

* If a defendant be in custody on mesne process, and the cause proceeds and judgment be obtained, the plaintiff may issue execution against the defendant's effects whilst he is in custody. (*Jones* v. *Tye*, H. T. 1832, B. C., 1 D. P. C. 181). A plaintiff, taking a bill of exchange in payment of the debt and costs of an action, may, upon the bill being dishonoured, arrest the defendant on a ca. sa., without delivering up the bill.

† After final judgment and costs taxed in the Court of Great Sessions, before 11 Geo. 4 & 1 Will. 4, c. 70, execution allowed to issue without notice upon the certificate filed, and an affidavit of the costs not having been paid. (*Rees* v. *Rees*, E. T. 1831, Ex., 2 Tyrw. 384).

4. *With reference to the Party being estopped from suing out.*

FOREMAN *v.* JEYES, M. T. 1833. K. B. 5 *B. & Ad.* 836.

Where execution issued out of the K. B. after an injunction to stay, the K. B. refused to interfere*.

THE plaintiff had obtained the verdict by an award, upon which an injunction, staying further proceedings, had been obtained. The plaintiff having issued a ca. sa. upon the judgment—

The Court of King's Bench refused to interfere.

WOODLAND *v.* FULLER, E. T. 1840. Q. B. 11 *Ad. & E.* 859; S. C. 3 *P. & D.* 570.

So, the vesting order of the Insolvent Debtors' Court does not supersede an execution where delivered on the same day†.

THE writ of execution was delivered to the sheriff's deputy in town on the same day, but at an earlier hour than the vesting order of the Insolvent Court under 1 & 2 Vict. c. 110.

The Court held, that the latter being only substituted for, and having no greater effect than the assignment formerly, and the goods being bound by the delivery of the writ, the rights of the execution creditor were not defeated by such vesting order, although the assignees first take possession of the goods.

---

5. *With reference to the Period limited for suing out.*

SIMPSON *v.* HEATH, M. T. 1839. Ex. 5 *M. & W.* 63; S. C. 7 *D. P. C.* 832.

If writ sued out within the year from judgment, it may be executed after the expiration of the year, without a sci. fa.‡.

ON motion to set aside an execution, it appeared that the ca. sa. was taken out within a year after the judgment.

The Court held, that the defendant might be taken in execution upon it after the expiration of the year, although not returned and filed within the year, and no sci. fa. is necessary.

* Where the action, for the hire of a steam-boat, was referred and decided in favour of the defendant, and the latter brought a cross-action for misusing it, and obtained a verdict and damages, but a rule for a new trial was pending, the Court refused a motion to stay the execution in the former as premature until steps were taken to enforce the award. (*Johnson* v. *Lakeman*, E. T. 1834, Ex., 2 D. P. C. 646).

† But a bonâ fide assignment of effects for benefit of creditors takes precedence of a subsequent execution. (*Riches* v. *Evans*, 1840, N. P., 9 C. & P. 640).

‡ Where the party was taken in execution on a judgment above a year old, without any sci. fa. to revive, and the proceeding therefore a nullity:—Held, that lapse of time did not bar the defendant from taking the objection. (*Mortimer* v. *Piggott*, T. T. 1834, B. C., 2 D. P. C. 615; S. C. 4 Ad. & E. 363, n.).

After a lapse of seven years, it is too late to object that execution was issued on a judgment ten years old, without any rule for sci. fa.:—Held also, that a hab. corp. ad satisfac. could only issue against such defendants as are in custody, although the judgment is against others also. (*Wilson* v. *Bacon*, M. T. 1831, B. C., 1 D. P. C. 118).

6. With reference to the Form of, and mode of conducting†.*

BASTARD *v.* TRUTCH, T. T. 1835. K. B. 3 *Ad. & E.* 451; S. C. 5 *N. & M.* 109; S. C. 4 *D. P. C.* 6.

Where a writ is directed to the coroner, it need not appear that the sheriff is a party.

A RULE had been obtained, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody. It appeared that judgment had been entered up on a cognovit for 200*l.*, and that the plaintiff, being sheriff of the county of Devon, the defendant, being a prisoner, was charged in execution upon a capias ad satisfaciendum, sued out upon that judgment, and directed to the coroner of the county of Devon. It was alleged, that the writ was irregular, inasmuch as it ought to have appeared upon the face of the ca. sa why it issued to the coroner. The writ was delivered to the officer of the gaol; and it was contended, that this was not sufficient to charge him in execution of the coroner.

The Court held, that where a writ is directed to the coroner of the county, it need not appear upon the face of it that the sheriff was a party to the suit.

ERDY *v.* MARTIN, E. T. 1840. Ex. 6 *M. & W.* 480; S. C. 8 *D. P. C.* 342.

A writ issued before 1 & 2 Vict. c. 110,

BY the 17th sect. of 1 & 2 Vict. c. 110, every judgment-debt is to carry interest from the time of entering up the judgment, such interest to be levied under a writ of execution on the judgment; and

* By Rule, H. T. 2 Will. 4, it is ordered, "That it shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment-paper, postea, or inquisition has been seen by the proper officer."

Forms of writs of execution framed by the Judges, pursuant to 1 & 2 Vict. c. 110, s. 20. (R. G., H. T. 2 Vict., 1 Per. & Dav. 313; 5 Bing. N. C. 366; 7 Scott, 1; 4 M. & W. 546).

A ca. sa. cannot be tested before judgment signed. (*Peacock* v. *Day*, H. T. 1835, B. C., 3 D. P. C. 291).

Notwithstanding the 3 & 4 Will. 4, c. 58, a fi. fa. may be tested the last day of the preceding term, where judgment was signed after the defendant's death in the vacation. (*Brocher* v. *Pond*, H. T. 1834, B. C., 2 D. P. C. 472). And where the plaintiff obtained a verdict at the spring assizes, the defendant died on the 18th of April, costs were taxed on the 21st, final judgment signed on the 22nd, and a fi. fa. issued on the same day, tested on the first day of the term, the Court refused to set aside the fi. fa. for the irregularity. (*Watson* v. *Maskill*, E. T. 1834, C. P., 2 Dowl. P. C. 810; 4 M. & Scott, 461).

After the lapse of two terms, the Court will not discharge a defendant out of custody on the ground that his addition and place of abode are not indorsed upon the writ of ca. sa. (*Constable* v. *Fothergill*, T. T. 1834, B. C., 2 D. P. C. 591). The Court will not discharge a defendant out of custody on a testatum ca. sa. on the ground of the want of an indorsement on the ca. sa., pursuant to the rule of Hil. Term, 2 & 3 Geo. 4. (*Davidson* v. *Dunne*, 4 Dowl. P. C. 119).

† Where the sheriff's officers, in executing a ca. sa., entered through an opening in an outer wall of the house, leading into a small closet, where was a staircase roughly boarded up:—Held, that if such opening had been intended to have had a door or window put therein, it was to be considered as the outer fence, which, being open, the defendant might enter; but if intended to be left open, then that the staircase window was to be deemed the fence of the house, and which the defendant could not justify the breaking for the purpose of entering. (*Whalley* v. *Williamson*, 1836, N. P., 7 C. & P. 294).

Where the defendant, being plaintiff in an inferior court, attended the officer executing its process:—Held, that he was responsible for the officer's acts, and that it was his duty to point out the goods to be seized; but that he was not answerable for an unjustifiable assault committed by the officer, unless it was shewn to have been in some way committed by his direction. (*Meredith* v. *Flaxman*, T. T. 1831, N. P., 5 C. & P. 99).

by the 20th section, such new or altered writs are to be sued out of the courts of law as by such courts shall be deemed necessary for giving effect to the provisions of the act, and in such forms as the Judges of such courts shall think fit to order. After that statute, but before the late form of Hilary Term, 3 Vict., a writ of ca. sa. was issued, commanding the sheriff to take the defendant, &c., to satisfy the plaintiff his debt and costs, together with interest, &c.; and further commanding him to do all such things as the statute authorized.

may be amended and altered to correspond with the new forms*.

The Court held, that, as the statute did not require that the old forms should be adhered to until new forms of writs were ordered, the writ might properly be adapted so as to make the additional remedy given by the statute available, though the Judges had not promulgated any new forms.

M'Cormack *v.* Melton, T. T. 1834. K. B. 3 *N.* & *M.* 881; S. C. 1 *Ad.* & *E.* 331.

On motion to amend a capias ad satisfaciendum—

The Court allowed an amendment by inserting the true sum, the mistake not being intentional, and the defendant not damnified.

And a ca. sa. may be amended as to the sum†.

---

7. With reference to speedy Execution under the 1 *Will.* 4, *c.* 7.

By 1 Will. 4, c. 7, s. 1, execution may issue immediately upon writ of inquiry, unless stayed.

By 1 Will. 4, c. 7, s. 1, after reciting the judgment and execution, in actions brought in his Majesty's courts of law at Westminster, are often delayed by reason of the interval between the terms; now, for the prevention of such delay, be it enacted, "That any writ of inquiry of damages to be issued in or by either of the said courts, by whatever form of action the same may have been commenced, may be made returnable and be returned on any day certain in term or vacation, to be named in such writ, and such writ shall be as valid and effectual as if the same had been returnable according to the course of the common law; and thereupon, at the return thereof, a rule for judgment may be given, costs taxed, final judgment signed, and execution issued forthwith, unless the sheriff or other officer before whom the same may be executed shall certify, under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court to set aside the execution of such writ, or one of the Judges of the said Courts shall think fit to order the judgment to be stayed until a day to be named in such order: provided always, that in case the signing of judgment on such writ shall be postponed by

* The Court will permit the teste of a ca. sa. to be amended when irregular, as not being tested on the day it issued, even as against bail. (*Englehart* v. *Dunbar*, T. T. 1832, B. C., 2 D. P. C. 202).

† A capias ad satisfaciendum in the body of it stated the sum recovered to be 100*l.*, but was indorsed for 88*l.* only, that being the real amount of the damages and costs; and the defendant was actually taken in execution for the smaller sum. After rule obtained to set aside the ca. sa., and discharge the defendant out of custody, a rule was obtained to amend the ca. sa. The Court set aside the rule with costs, and made the second absolute on payment of costs. (*Bernall* v. *Weatherley*, 5 Tyr. 485).

reason of such certificate or order, or by the choice of the plaintiff, or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the day of the return of such writ, unless the Court shall otherwise direct."

And by sect. 2, a Judge may certify for immediate execution*.

By sect. 2, it is enacted, "That, in all actions brought in either of the said courts, by whatever form of process the same may be commenced, it shall be lawful for the Judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any consideration or qualification, and in case of a verdict for the plaintiff then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment must be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the postea, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of distringas juratoris, or habeas corpora juratorum, may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

LANDER *v.* GORDON, M. T. 1840. Ex. 8 *D. P. C.* 910; S. C. 7 *M. & W.* 218.

And such an order cannot

IN this case, at the trial before *Gurney*, B., at the last Guildford Assizes, the jury having found a verdict for the plaintiff, the learned

* If in an action for goods sold, there be a special demurrer to the count upon an account stated, which has not been argued at the time of the trial, and the jury find for the plaintiff on the count for goods sold, the Judge, if it be a proper case for speedy execution, will order it on the plaintiff's undertaking to enter a nolle prosequi as to the count demurred to. (*Allsop* v. *Smith*, M. T. 1836, N. P., 7 C. & P. 708). Where a Judge has made an order for speedy execution under 1 Will. 4, c. 7, s. 4, and the defendant at once pays over the sum in question, and a motion for a new trial is afterwards made, the Court will not order the plaintiff to pay the sum he has received into Court during the pendency of that rule. (*Morton* v. *Burn*, H. T. 1836, B. C., 5 D. P. C. 421). Where the action was in debt on simple contract, making it necessary for the party to plead and defend the action, the Judge refused to certify that execution might immediately issue under 1 Will. 4, c. 7, s. 2—(*Tenterden*, L. C. J., *Fisher* v. *Davies*, 2 M. & M. 93). The Court refused to act on affidavit upon application for immediate execution under 1 Will. 4, c. 7. (*Gervas* v. *Burtchley*, 1830, N. P., 2 M. & M. 150). In another case the Court did act on affidavits, with a view to ordering immediate execution—(Per *Bayley*, B., *Ruddick* v. *Simmons*, 1 M. & Rob., N. P., 184). The Judge can only give a certificate for immediate execution, or the plaintiff must wait until the term; but it was granted for immediate execution, the lessor of plaintiff undertaking not to put it in force if the defendant complied with certain terms within a month. (*Doe* d. *Packer* v. *Hilliard*, 1831, N. P., 5 C. & P. 132). Although it is in the discretion of the Judge to certify for immediate execution, *semble*, the Judge will not do so in cases where there is a reasonable ground of defence—(Per *Tenterden*, L. C. J., *Lyndhurst*, L. C. B., and *Patteson*, J., *Barford* v. *Nelson*, 1831, N. P. 8). In another case allowed in trespass for mesne profits—(Per *Patteson*, J., *Barden* v. *Cox*, 1 M. & Rob., N. P., 283). In one case, in debt, refused—(Per *Park*, J.,

Judge had, during the Assizes, certified pursuant to the stat. 1 Will. 4, c. 7, s. 2, for execution in a month. The certificate was dated on the 7th of August, and on the 31st final judgment was signed. On the 5th of September, two days before the expiration of the period mentioned in the certificate, the learned Baron, upon an application made to him at chambers on behalf of the defendant, ordered a stay of proceedings until the fifth day of the present term, and that the defendant should in the mean time give the plaintiff security for a certain amount of the damages and costs.

be rescinded after final judgment signed.

The Court held, that a Judge has no power to order a stay of proceedings after a certificate for speedy execution has been granted and final judgment has been signed.

---

8. *With reference to concurrent Writs*.*

SMITH *v.* JOHNSON, T. T. 1835, Ex. 2 *C., M. & R.* 350; S. C. 4 *D. P. C.* 208.

A FI. FA. having been delivered to the sheriff's officer on the 23rd of April, on the following day the officer wrote a letter, stating that the defendant was only a lodger, and had no effects; in consequence of which letter the plaintiff, on the succeeding day, lodged a ca. sa. with the sheriff's deputy in London. On the 29th the plaintiff, having heard that the defendant had goods, and that the letter of the officer was false, wrote to the officer, directing him not to arrest the defendant, but to take his goods; and on the 1st of May obtained a side-bar rule for a return of the writ of fi. fa. The sheriff applied to discharge that rule, on the ground that the fi. fa. was superseded by the ca. sa. subsequently issued.

The plaintiff may issue concurrently writs of different forms, at one and the same time, provided only one be executed;

The Court held, that whether it was so or not, the plaintiff had a right, under the circumstances, to have a return to the fi. fa.

HODGKINSON *v.* WHALLEY, M. T. 1831. Ex. 2 *C. & J.* 86; S. C. 2 *Tyrw.* 174.

CONCURRENT writs of fieri facias and capias ad satisfaciendum had issued on a judgment by cognovit; and the seizure and sale under the fi. fa. yielding only sufficient to pay the expenses of the

but a fi. fa. and ca. sa. cannot issue and be in force concur-

Percival v. *Alcock*, 1 M. & Rob., N. P., 167; S. P. *Ward* v. *Crocket*, 1831, N. P., 5 C. & P. 10). But in a subsequent case allowed in assumpsit, although verdict taken by consent. *Park*, J., said, the same rule ought to apply as to debt. (*Younge* v. *Crooks*, 1 M. & Rob., N. P., 220).

* Where the defendant had withdrawn from possession under a fi. fa., in consequence of the defendant having informed him that he had sold the goods to cheat the plaintiff:—Held, that the sheriff might take the defendant under a ca. sa. for the same debt, without previously returning the fi. fa. (*Knight* v. *Coleby*, 5 Mee. & W. 274).

If a defendant dies in execution, a fi. fa., tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will support a testatum issued under the 21 Jac. 1, c. 24, s. 2, into a foreign country. (*Farncombe* v. *Kent*, H. T. 1834, B. C., 2 D. P. C. 464).

Where a fi. fa. has issued, and a levy less than the plaintiff's debt has been made, a ca. sa. cannot issue till after the return-day of the fi. fa., although, in fact, the sheriff has made a return to it, and the ca. sa. recites the writ and the sheriff's return. (*Lawes* v. *Codrington*, H. T. 1831, B. C., 1 D. P. C. 30).

rently, where the fi. fa. has been executed.

execution and part of the landlord's claim for rent, the defendant had been taken in execution upon the ca. sa.

Per Cur.—The difficulty is this: the entries on the roll would be error, as you would have to enter an award of two writs. When the writs are not both executed, this irregularity does not appear, as it is not usual to enter the award of that which is not executed; but here you must, as there has been a seizure under the fi. fa., which will be returned, and also a return to the capias ad satisfaciendum. The principle upon which the rule is founded is, that these two writs, upon which you are acting, must not be running at the same time. Here there was a seizure of the goods; and therefore you were not at liberty, having seized them, to act on the other concurrent writ.

DICAS *v.* WARNE, M. T. 1833. C. P. 2 *D. P. C.* 762; S. C. 10 *Bing.* 341; S. C. 3 *M. & Scott*, 814.

A ca. sa. may issue before the return of the fi. fa., if the defendant's goods be seized under a distress for taxes.

THE plaintiff issued in the first instance a writ of fi. fa. against the goods of the defendant, for the sum of 81*l.*, returnable on the 2nd of November. The officer took possession on the 6th of July, and remained until the 20th, upon which day he was withdrawn, and the plaintiff issued a ca. sa., returnable also upon the 2nd of November, upon which the defendant was arrested. Whilst the officer was in possession, it appeared that there were two executions prior to that of the plaintiff—one for rent, and the other for the King's taxes. On motion to set aside a ca. sa.—

Per Cur.—If no fruit can be derived from the execution, he (the plaintiff) may, upon abandoning the fi. fa., and levying nothing, sue out a writ of ca. sa. before the return of the fi. fa.

See Edmunds v. *Ross*, 9 *Price*, 5.

---

9. *With reference to successive Writs.*

COLLINS *v.* BEAUMONT, M. T. 1839. Q. B. 2 *P. & D.* 363.

Where a party is discharged on ground of writ being irregular, he may be taken again on a fresh writ*.

SCI. FA., on a judgment recovered in the Court of Queen's Bench. Plea, that the plaintiff sued out a writ of ca. sa. on that judgment, and took the defendant in execution thereon. Replication, that the defendant applied to Mr. B. *Gurney* for his discharge out of custody, on the ground of irregularity; who, on finding the arrest was irregular, ordered him to be discharged out of custody, with costs, he undertaking not to bring an action; that he was thereupon discharged, and the Judge's order was made a rule of court. Demurrer, that the defendant was discharged from the judgment, having once been taken in execution upon it.

The Court held that a defendant, who has been arrested on a capias ad satisfaciendum, and on his own application discharged from such arrest on the ground of irregularity, is not thereby discharged from the judgment by reason of his having before been taken in execution on it.

* Where a sheriff's officer, taking possession under a hab fac. poss., is dispossessed before he delivers possession to the lessor of the plaintiff, it is necessary that it should appear, before new writ granted, that the persons dispossessing are acting in concert with the defendant. (*Doe* v. *Mirehouse*, T. T. 1833, B. C., 2 D. P. C. 200).

10. *With reference to setting aside*.*

(*b*) In particular.

1. *Of the Capias ad Satisfaciendum†.*

Reynolds *v.* Newton, H. T. 1840. Q. B. 1 *Gale & D.* 153.—S. P. Plomer *v.* Ball, T. T. 1836. K. B. 5 *Ad. & E.* 823.—S. P. Collins *v.* Beaumont, E. T. 1832. Q. B. 2 *P. & D.* 363.

An arrest upon an insufficient ca. sa. does not discharge the defendant from other writs.

On motion to discharge the defendant out of custody, it appeared that the defendant was taken on a ca. sa. under a judgment above a year old, and not revived by sci. fa.

The Court held, that, although entitled to his discharge, as to the arrest on that suit, it did not extend to invalidate other writs against him in the hands of the sheriff, and that the detention thereon was legal; besides he was liable to be taken in execution on another valid ca. sa.

Lewis *v.* Morris, E. T. 1834. Ex. 2 *C. & M.* 712; S. C. 4 *Tyrw.* 997.

But if two writs of ca. sa. issue, care should be taken that both be not executed.

Two writs of ca. sa. were issued at one time into Anglesea and Carnarvonshire. The debtor was arrested in Anglesea on 1st November, and having paid debt and costs to the sheriff was discharged. The next day he was arrested in Carnarvonshire on the other ca. sa., and was detained in custody till the 15th, when the debt and costs were paid over to the creditor, several days after he had been acquainted with the previous fact. The debtor then sued the creditor and his attorney, in case, for malicious non-feasance, in not giving notice to the sheriff of Carnarvonshire that the writ issued into Anglesea; that it had been executed on the judgment, and sa-

* Where a defendant died between eleven and twelve o'clock in the morning, and a writ of fi. fa. was sued out against his goods between two and three in the afternoon of the same day, the Court set aside the execution as irregular. (*Chick* v. *Smith*, 8 D. P. C. 337).

† The Court of Common Pleas will not discharge a defendant from custody under a ca. sa. on the ground that he has been before irregularly taken, and discharged under a criminal process, at the instance of the plaintiff. (*Mackie* v. *Warren*, 5 Bing. 175; 2 M. & P. 279). A variance between the sheriff's warrant and a ca. sa. lodged in his office is immaterial. (*Rose* v. *Tomblinson*, 3 Dowl. P. C. 49).

The Rule, Hil. T. 2 & 3 Geo. 4, requiring a defendant's addition and place of abode to be indorsed on a writ of ca. sa., is for the benefit of a defendant; and if the place of defendant's abode cannot be discovered, he may be described of his last place of abode. (*Bettyes* v. *Thompson*, M. T. 1838, B. C., 7 D. P. C. 322).

Where a defendant was taken in execution on a test. ca. sa. in July, 1833, it is too late for him to object that there was no indorsement on the writ of his residence, pursuant to Hil. T. 2 & 3 Geo. 4, K. B., on the first day of Hilary Term, 1838, although he swears that he was not aware of the defect until a short time before the application, as he was bound to be aware of the defect as soon as he was aware of the proceedings in which the defect arose. (*Esdaile* v. *Davis*, E. T. 1838, B. C., 6 D. P. C. 465). It is not necessary, in the Court of Common Pleas, to indorse on a writ of ca. sa. the addition of the defendant, the Rule of 2 & 3 Geo. 4, requiring such indorsement, applying only to the Court of Queen's Bench. (*Brown* v. *Hudson*, M. T. 1839, C. P., 8 Scott, 324; 6 Bing. N. C. 152; 8 Dowl. P. C. 4).

tisfaction obtained; and that the writ directed to him was not to be executed.

The Court held, in the absence of proof, that, before the second arrest, any notice had reached the creditor or his attorney of the first arrest, or of the payment of the debt and costs, or that, at any time before his discharge, the plaintiff had applied to either for the maliciously withholding such notice, which had been thereupon maliciously withheld, he could not maintain the action.

OWEN *v.* OWEN, E. T. 1831. K. B. 2 *B. & Ad.* 305.

If a defendant be in custody, delivering a ca. sa. to the sheriff is sufficient to fix him.

A TESTATUM ca. sa. was delivered by the sheriff in whose custody the defendant then was under other process.

The Court held, that, by the delivery of the writ, the execution attached; and the plaintiff having issued a hab. corp. ad satisfac., in order to remove the defendant to the custody of the marshal, the Court remanded the prisoner to the custody of the sheriff.

ATKINSON *v.* BAYNTUM, H. T. 1835. C. P. 1 *Bing. N. S.* 444; S. C. 1 *Scott*, 404.

An action may be maintained upon an agreement, in consideration of discharging a defendant out of execution, a second execution should issue if necessary*.

UPON a mortgage-deed and warrant of attorney for securing the payment by instalments, with power for the plaintiff, at any time, from time to time to issue execution for the whole or any part thereof; the mortgagors being in execution for part of the amount secured, the defendant undertook that, in consideration of their being discharged, he would procure them to be forthcoming if it should become necessary that a second execution should issue.

The Court held, in an action for breach of such undertaking, upon the subsequent default by the mortgagors, that it not appearing that they were to be charged a second time in execution for the same sum for which they had already been in custody, the plaintiff was entitled to judgment upon the demurrer to the declaration; held also, that the plea by the defendant, that the original execution was not valid, was not sustainable; for after having by his undertaking obtained the discharge, he was estopped from objecting that the writ under which they had been detained was not valid.

---

2. *Of the Habeas Ca. Sa.* See also post, tit. *Habeas Corpus*†.

* Where a plaintiff discharges one of two joint-debtors, the other has a right to be discharged; and, therefore, a promise by the third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration. (*Herring* v. *Dorell*, T. T. 1840, B. C., 8 D. P. C. 604).

Where a defendant has been taken in execution on a ca. sa., to execute which the sheriff's officer broke open an outer door, the Court will discharge him out of custody on a summary application. (*Hodgson* v. *Towning*, H. T. 1836, B. C., 5 D. P. C. 410).

† Where a part of a debt has been levied, and the defendant is detained on a hab. corp. ad satisfac. for the residue, it is not necessary to refer, on the latter writ, to the amount of the levy made. Where 1 Reg. Gen. H. T. 2 Will. 4, s. 5, as to the addition of deponent, need not be strictly complied with. (*Green* v. *Foster*, T. T. 1833, B. C., 2 D. P. C. 191).

After a lapse of ten years, it is too late to object, that a ha. cor. ad satisfac., on which the defendant is charged in execution, was not indorsed with the number-roll. (*Wilson* v. *Bacon*, H. T. 1834, B. C., 2 D. P. C. 450).

3. *Of the Fi. Fa**.

1.—*In what Cases a Fi. Fa. may issue.*

LATIMER *v.* BATSON, M. T. 1825. K. B. 4 *B. & C.* 652; S. C. 7 *D. & R.* 146.

THE sheriff having seized goods under a fi. fa., at the suit of R., the latter took a bill of sale of them, and afterwards sold his interest for valuable consideration to the plaintiff, and the circumstance of the execution was notorious; but, by an arrangement with the original debtor, the latter still continued in possession—

The sheriff sold under a fi. fa., but the vendor allowed the debtor to remain in possession, on a subsequent execution it is for the jury to say whether it is bonâ fide.

The Court held that the Judge properly directed the jury, in an action brought against the sheriff, who had seized the same goods under a subsequent execution, to find for the plaintiff or defendant according to their opinion, that the first transaction was fair or fraudulent.

EDWARDS *v.* FAREBROTHER, M. T. 1828. C. P. 2 *M. & P.* 293; S. C. 3 *C. & P.* 524.

IN trespass, it appeared that the defendant and the plaintiff had cohabited together for several years, and that the plaintiff had during that time answered to the name of Mrs. Salmon, when addressed by persons who called at the house, and that they had a child christened and entered in the register as "Emma, daughter of Thomas and Sarah Mary Salmon" (Sarah Mary being the Christian name of the plaintiff. It was also proved that the house was rented in the name of Salmon till a short time before the execution, when it was altered to the name of Edwards by the landlord's agent, in consequence of a false representation made to him by Salmon, and that the landlord had afterwards consented to the alteration.

Where goods seized are claimed by a party who has cohabited with the defendant, it is a question for the jury whether they had not been given up by her, and become the property of the defendant in the action†.

The Court held that, where a woman has cohabited with a man for several years and passed as his wife, she cannot maintain trespass against a sheriff for taking goods in execution against the man, they being in the house where the parties resided; but it having been left to the jury to say whether they thought that the property might not have been given up by the woman to the man during cohabitation, and they having found in the affirmative:—Held, that their verdict is conclusive.

2.—*As to the Things which may be taken in Execution under a Fi. Fa.*

LEGGE *v.* EVANS, H. T. 1840. Ex. 8 *D. P. C.* 177; S. C. 6 *M. & W.* 36.

To a declaration in trover the defendants pleaded, that before the defendants converted and disposed of the said goods and chattels, one N. T. had sued out of the Court of her Majesty the Queen a writ

A lien cannot be sold by the sheriff‡.

* Although the goods of a debtor are bound from the delivery of execution to the sheriff, yet the property in them is not changed, and is still in the debtor; and he may sell them, subject to the rights of execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt. If a fi. fa. has been issued, the plaintiff, by the 43 Geo. 3, c. 46, is entitled to be paid the expenses of it, though no levy is made under it; and a tender of the amount recovered, without the costs of the writ of fi. fa., is not sufficient.

† Quære, whether *Mace* v. *Caddell*, Cowper, 232, is law.

‡ The surplus of the proceeds of property sold under a fi. fa., remaining in the

of fieri facias, directed to the sheriffs of Middlesex, commanding them, of the goods and chattels of the plaintiff, to levy &c.; and that, by virtue of that writ, the defendants, being such sheriffs as aforesaid, seized and took in execution the said goods and chattels for the purpose of levying &c., which was the conversion in the declaration mentioned. Replication, setting up a possession in right of a lien. On demurrer—

The Court held, at common law, the sheriff can seize only those things which he can sell; and therefore a lien, which is a mere personal right, and cannot be made the subject-matter of a sale, cannot be taken in execution under a fi. fa.

3.—*Relative to the Mode of conducting the Execution under.*

PRINGLE *v.* ISAAC, M. T. 1822. Ex. 11 *Price*, 445.

Under an order not to execute a fi. fa., unless another comes in, the sheriff

THE sheriff received, together with a writ of fi. fa., instructions to suspend the execution unless another writ should be sent into the office, which was the case.

The Court held, that the sheriff was justified in levying and

hands of the sheriff after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a fi. fa. at the suit of a third party against the defendant in the former suits. (*Harrison* v. *Paynter*, 6 Mee. & W. 387; 8 Dowl. P. C. 349). Goods were taken under a fi. fa. as the goods of Sophia W.; and on an issue directed to try whether the goods were the property of J. B., it was proved that the goods, prior to 1836, belonged to Martin W., when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W., with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid 128*l.* to the official assignee for Martin W.'s interest in the goods. Early in 1839 Martin W. took the benefit of the Insolvent Debtors' Act, but his assignees never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a fi. fa. against Sophia W. The goods always had remained in the possession of Martin W., as the ostensible owner of them, and Sophia W. never was in possession of them:—Held, that on these facts J. B. had made out his property in the goods; and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent. (*Burling* v. *Paterson*, T. T. 1840, N. P., 9 C. & P. 570). A., expecting an execution, executed a deed assigning all his property to trustees for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by J. S. against A. This deed was executed at 9 P. M. on the 25th of February. A writ of fi. fa. was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 P. M. on the 25th:—Held, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the fi. fa. (*Bowen* v. *Bramidge*, 1833, N. P., 6 C. & P. 140). An intestate died in the month of August; her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a fi. fa. against the administrator for a debt of his own:—Held, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure; but, semble, that, if the administrator had remained in possession for a very long time, it would have been otherwise. (*Gaskell* v. *Marshall*, M. T. 1831, N. P., 2 M. & M. 132; S. C. 5 C. & P. 31). Where a defendant, privileged from arrest, upon being taken on a ca. sa. paid the money into the hands of the sheriff of G., and afterwards obtained a Judge's order for its being repaid him:—Held, that the money could not be taken under a fi. fa., in the hands of the sheriff of Middlesex, from the town agent of the sheriff of G., who had been directed to pay it over. (*Masters* v. *Stanley*, H. T. 1840, Ex., 8 D. P. C. 169).

satisfying, first, the latter writ, and that no action for a false return could be supported against him. As an officer of the public, he cannot lend himself to any accommodation between parties which may be injurious to others.

may execute the last first*.

SOWELL *v.* CHAMPION, T. T. 1838. Q. B. 6 *A. & E.* 407.

AN attorney delivered a writ of execution to the bailiff of an inferior court, to be executed upon the goods of a certain party, whose house was supposed to be within the jurisdiction, but in point of fact was not. He knew the situation of the house, but gave no specific directions that the levy was to be made there, though he informed the party that the levy would be made.

A seizure in a county into which the process does not run renders the sheriff liable†.

The Court held, not sufficient evidence to make him liable in an action of trespass brought against the bailiff and the attorney for the illegal seizure.

4.—*As to the Landlord's Right to Rent under a Fi. Fa.*

WILLIAMS *v.* LEWSEY, M. T. 1831. C. P. 8 *Bing.* 28; S. C. 6 *M. & P.* 92.

ON a rule nisi for the plaintiff, who had levied under a fi. fa., to pay over to the landlord 450*l.*, the amount of a year's rent, pursuant to a notice for that purpose. The sheriff, having an indemnity from the plaintiff, had refused to pay more than 360*l.*, because the landlord had abated his rent from 450*l.* per annum to that sum.

Under an execution the landlord is entitled to the full year's rent without reference to any abatement allowed to the tenant‡.

The Court held, that what the landlord had done was voluntary; and that he was not bound to make a present to the creditors of his tenant, because he had chosen on a former occasion to make a present to the tenant himself.

TAYLOR *v.* LANYON, E. T. 1830. C. P. 6 *Bing.* 536.

THE defendant sued out a fi. fa. on the 30th of June upon a judgment signed on that day, upon a warrant of attorney given

But, the rule that the land-

* If too small a sum be indorsed on a fi. fa. another may issue for the residue by leave of the Court. (*Hunt* v. *Passmore*, M. T. 1833, B. C., 2 D. P. C. 414). A sheriff, deceived by the mis-statement of a defendant, is not estopped from proceeding on a second writ by the defendant alleging that what he had formerly said was untrue. (*Knight* v. *Coleby*, Ex., 5 M. & W. 274; abridged, post, tit. *Sheriff*). A fi. fa. issued same day, but after death of defendant, is irregular. (*Chick* v. *Smith*, H. T. 1840, B. C., 8 D. P. C. 337).

† In an action by a landlord against the sheriff, the Court refused to allow the proceeds of the sale to be paid into Court with the costs of the action, though it was sworn that the sale was regularly conducted. (*Groombridge* v. *Fletcher*, 2 Dowl. P. C. 353).

‡ If an agreement for the assignment of a piece of ground on payment of a sum of 1260*l.* contain a clause, that the party agreeing to take the assignment shall pay and allow, at the rate of 100*l.* per annum from the time of taking possession until the completion of the purchase, in equal half-yearly payments, a sheriff, on a writ of fi. fa., ought not under such clause to treat the 100*l.* as rent and deduct it out of the proceeds of the execution. (*Saunders* v. *Musgrave*, T. T. 1826, N. P., 2 C. & P. 294).

Before the recent statutes of amendment, in an action against the sheriff upon 8 Anne, c. 14, for removing goods without satisfying the landlord a year's rent, the declaration, alleging the fi. fa. to have issued out of K. B., but which proved in evidence to have issued out of C. P.:—Held, a variance in a material point, and nonsuit right. (*Sheldon* v. *Whittaker*, 4 B. & C. 657; S. C. 7 D. & R. 123; S. C. 1 Ry. & M. 266).

lord is entitled to a year's rent under an execution, does not apply where the execution is issued by himself.

by J. S. on the 1st of July. The goods of J. S. were taken in execution and sold on the 18th; the defendant, who was also the landlord of the premises on which the goods were taken, retaining the sum of 130*l.* for a year's rent beyond the amount of the judgment debt. J. S. surrendered himself to prison at the suit of another creditor on the 14th of June; and on the 19th of July filed his petition in the Insolvent Debtors' Court.

The Court held, that, under the 34th sect. of the 7 Geo. 4, c. 57, the assignees of J. S. were entitled to recover the sum so retained in an action for money had and received; the stat. 8 Anne, c. 14, s. 1, contemplating the case of an adverse execution, not an execution at the suit of the landlord himself.

5.—*Relative to pleading a Justification under a Fi. Fa.*

BUCKENHORN *v.* FRANCIS, E. T. 1826. C. P. 11 *Moore*, 40.

A plea, justifying under a fi. fa., must allege the outer door was open.

IN trespass, for breaking into doors, &c., in plaintiff's house, plea justified the breaking and entering under a pluries fi. fa., but did not allege that the outer door was open. On special demurrer—

The Court held the plea bad, and would have been bad on general demurrer; or it might have been treated as a nullity, as not containing an answer to the whole charge in the declaration.

---

4. *Of the Elegit*.*

COOPER *v.* GARDNER, T. T. 1835. K. B. 3 *Ad. & E.* 211.

In a doubtful case, as to the estate taken by a party, the Court will not decide it on motion.

UPON an elegit the inquisition found, that the defendant was possessed of a term as mortgagee, but it was a question upon a devise whether the term was vested in him or the executrix.

The Court refused to decide on motion whether there was an interest liable to be extended.

HAMS *v.* PUGH, T. T. 1827. C. P. 4 *Bing.* 60.

Where the debtor has not the sole equitable estate, it cannot be seized under an elegit.

THE testator devised lands to M. J. for life, then to the use of Lord Ducie, and T. G., in trust for W. J. for life, and after the death of W. J. for R. G. C. for life, remainders over; with a declaration, that the testator had so limited the estate to the use of the trustees to the intent, that the legal estate so vested in them might support the several contingent limitations, subject to the estate limited in trust for W. J. In Easter Term, 1815, the plaintiff recovered a judgment against R. G. C., which judgment was reversed by sci. fa. in Hilary Term, 1826, and execution by elegit issued

* The reason why a scire facias is required after the year to revive the judgment, viz. the presumption that the party lying by so long may have released the execution, applies equally to the case of an elegit. (*Putland* v. *Newman*, T. T. 1817, K. B., 6 M. & S. 179, overruling *Seymour* v. *Grenville*, Carth. 283). It seems the Court of Exchequer may refer it to the Masters on the equity side to take an account of the rents and profits of the lands extended, and to order the overplus to be refunded if the plaintiff has been overpaid. (*Brookbank* v. *Miers*, T. T. 1835, Ex., 4 D. P. C. 179).

thereon in April following. In December, 1825, the trustees made a conveyance of R. G. C.'s interest for the benefit of his creditors.

The Court held, that the legal estate being in the trustees at the time of the judgment, and they having conveyed it before execution sued, it could not be taken by virtue of the elegit.

HARRIS *v.* BROOKES, M. T. 1827. C. P. 4 *Bing.* 96.

UNDER an inquisition on an elegit against C. on a judgment obtained by plaintiff, it was returned, that he was seised for life of lands in the defendant's occupation; and in debt for use and occupation it was proved, that the lands were vested under a marriage settlement in trustees for a term to raise a certain sum, which had not yet been done, but in the mean time C. had been allowed to receive the rents and profits.

The Court held, that the plaintiff could not recover. Semble, even if the tenant by elegit had a right to recover, he could not have proceeded for rent without an attornment.

So, where premises are held under trustees under a marriage settlement to raise a certain sum, the rents and profits are not available under an elegit against the husband.

DOE *d.* DAVIES *v.* CREED, H. T. 1829. C. P. 5 *Bing.* 327; S. C. 4 *M. & P.* 648.

TWO elegits were issued on two several judgments of the same term, and delivered to the sheriff the same day, though by different plaintiffs, and inquisitions taken thereon at the same time.

The Court held, that the sheriff must deliver under each writ a moiety of the whole lands whereof the defendant was seised at the time of the issuing of the elegits.

Where writs issue tested the same day, the sheriff must take a moiety of each.

PRICE *v.* VARNEY, H. T. 1825. K. B. 3 *B. & C.* 733; S. C. 5 *D. & R.* 612.

ON a rule calling upon the plaintiff to shew cause why it should not be referred to the Master to take an account of the rents and profits received by the plaintiff out of an estate of the defendant in his possession under an elegit—

Per Cur.—The plaintiff's possession is by virtue of an execution issuing out of this Court, and the proposed reference is only to take an account of the monies received under that execution. No doubt the Master will allow every thing that is reasonable; and, if any difficulties occur in taking the account, he will present them to the Court.

The Court on motion will refer it to the Master to take an account of the rents and profits.

DOE *d.* EVANS *v.* OWEN, M. T. 1831. Ex. 2 *C. & J.* 71; S. C. 2 *Tyrw.* 149.

IN an action of ejectment under an elegit, against several parties in possession of the premises with the elegit debtor, at the commencement of the action, the elegit creditor proved the elegit debtor entitled to the whole property at the time of the judgment.

Per Cur.—The onus of proof did not lie upon the plaintiff, but upon the defendants. By the consent-rule, it is admitted that the defendants are in possession at the time of the ejectment. The

In ejectment by the elegit creditor, it will be for the tenants in possession to shew their title*.

* After elegit issued, the judgment was reversed :—Held, that the defendant was entitled to restitution. (*Casseldine* v. *Munday*, T. T. 1833, B. C., 2 D. P. C. 169).

elegit creditor stands upon the title of the debtor. Now, if the action had been brought by the debtor, the defendants could have had no defence to the action, unless they had proved a title to the possession as against him.

---

5. *Of the Levari Facias*.*

---

5. *Of the Venditioni Exponas.*

HUGHES *v.* REES, M. T. 1838. Ex. 4 *M. & W.* 468; S. C. 7 *D. P. C.* 56.

A venditioni exponas is not a process distinct from the fi. fa., but a part of it, being a direction to execute it in a particular manner.

A RULE calling upon the sheriff of the county of Carnarvon to shew cause why an attachment should not issue against him for contempt in not returning a writ of venditioni exponas within the time named in an order of *Coleridge*, J. The fi. fa issued early in July, to which the sheriff returned, that he had removed the goods, and that they remained in his hands for want of buyers, upon which a writ of venditioni exponas issued, which, by an order of *Coleridge*, J., was to be returned in six days after service. It was served on the 1st September. On the 1st November it was returned, and the money paid. On the 10th of November, this rule was applied for. The order had been made a rule of Court.

Per Cur.—A venditioni exponas is a species of *fi. fa.*, and was considered in the cases of *Charter* v. *Peeter*, (Cro. Eliz. 597), and *Milton* v. *Eldrington*, (Dyer, 99). The sheriff, therefore, was in contempt; but it would have been better, if the plaintiff had applied to him for any costs consequent upon his laches, which, it seems, he was ready to pay; however, the plaintiff was not bound to do so. The rule, under all the circumstances, will therefore be discharged upon payment by the sheriff of the costs of the rule to return the writ of venditioni exponas, and also the costs of this application.

---

7. *In inferior Courts†.*

* Where the bishop returned the writ of levari facias, and it had been filed before the execution was satisfied:—Held, that a rule might be made for taking it off the file, and for him to certify what he had done under it, absolute in the first instance. (*Alderton* v. *St. Aubyn*, H. T. 1840, Ex., 8 D. P. C. 223). It is a good objection to a rule requiring a bishop to make his return to a levari facias, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served upon the bishop. (*Phillips* v. *Berkeley*, 5 D. P. C. 279). A bishop cannot be required to make a return of what has been levied under a levari facias previous to his coming into office. (*Ib.*) The return was allowed to be amended, without costs. Where a party has been returned in the schedule of the collector of land-tax for a particular parish, under the 48 Geo. 3, c. 141, as in default for a sum assessed upon him for land-tax in that parish, and the schedule having been duly certified to the Court of Exchequer, a writ of levari facias had issued, under which such sum has been levied on his goods, and paid into the receipt of the Exchequer, the Court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish. (*In re Glattan*, 4 Mee. & W. 570).

† Where the original judgment in an inferior Court has been destroyed by fire, the Court will allow execution to be issued under a verified copy of the judgment. (*Cheesewright* v. *Franks*, E. T. 1838, B. C., 6 Dowl. P. C. 471).

II. IN CRIMINAL PROCEEDINGS*.

Where a party removes out of the jurisdiction of the Vice-Warden of the Stannary Courts, the Court of Queen's Bench cannot, under the 6 & 7 Will. 4, c. 106, issue execution on a final decree on the equity side of the Court. (*Harvey* v. *Gilbard*, H. T. 1839, B. C., 7 Dowl. P. C. 525).

A final order or decree of the Vice-Warden of the Stannary Courts, on the equity side, may be removed into the Court of Queen's Bench, the defendant having gone out of the jurisdiction, in order to issue execution pursuant to 1 & 2 Vict. c. 110, s. 22. (*Harvey* v. *Gilbard*, E. T. 1839, B. C., 7 Dowl. P. C. 616).

* In fixed and stated judgments, the law makes no distinction between a peer and a commoner. (See 2 Hawk. P. C. c. 48, s. 2). The Court may command execution to be done without any writ. (2 Hawk. P. C. c. 51, s. 3). But it must be executed by a legal officer; (2 Hawk. P. C. c. 51, s. 6); and pursuant to the judgment, which cannot be altered, even by the king, as from beheading to hanging. (Hale, P. C. 412). But the King may pardon or alleviate, but cannot extend the punishment beyond the intention of the law. (Fort. C. L. 269). If the judgment of the law be death, it is clear that, if a man be hanged, and come to life when cut down, he must be hung up again. (See 2 Hawk. P. C. c. 51, s. 7).

LONDON:
W. M'DOWALL, PRINTER, PEMBERTON ROW,
GOUGH SQUARE.

Rbd Riley's
Nov 77
86.